

Government Response to the Consultation on the Review of the EU Satellite and Cable Directive



Public Consultation on the Review of the EU Satellite and Cable Directive

Questionnaire

General information on respondents

I'm responding as:

The representative of an organisation/company/institution

What is your nationality?

United Kingdom

What is your name?

Joanna Huddleston

What is your email address?

joanna.huddleston@ipo.gov.uk

Is your organisation registered in the Transparency Register of the European Commission and the European Parliament?

No

Please choose the reply that applies to your organisation and sector.

Member State

My institution/organisation/business operates in:

United Kingdom

Please enter the name of your institution/organisation/business.

UK Government

Please enter your address, telephone and email.

Department for Business, Innovation and Skills
Intellectual Property Office
1st Floor
4 Abbey Orchard Street
London
SW1P 2HT, UK

Telephone: 0044 207 034 2865

Email: joanna.huddleston@ipo.gov.uk

What is your primary place of establishment or the primary place of establishment of the entity you represent?

N/A

I. Preamble

The UK Government welcomes the opportunity to respond to the European Commission's Consultation on the Review of the Satellite and Cable Directive ("the Directive").

The Digital Single Market

The Digital Single Market offers huge potential for driving job creation and growth across the European Union. Properly targeted reforms to enable further development of the Digital Single Market will have a key role to play in safeguarding Europe's future competitiveness.

The UK Government believes that a Digital Single Market ought to promote greater consumer choice and availability of digital content services across the European Union, while ensuring that creators and rightsholders are remunerated for use of their works and a variety of businesses, including SMEs, are able to operate effectively.

It is therefore right to consider whether steps can be taken to simplify and streamline copyright licensing. Reform should build markets to make it easier for EU consumers to access and pay for a diverse range of content across the EU, while addressing gaps in provision and reducing incentives for piracy¹. Businesses of all sizes should be supported in providing digital content services across the EU through the reduction and simplification of regulatory burdens, without damaging incentives to invest in the production of content.

The modern broadcasting environment

Consumers' experiences and expectations of audiovisual content and delivery mechanisms have changed drastically in the twenty years the Directive has been in operation. Traditional, linear television viewing remains very important in the UK – in 2014 just under 70% of the total time spent watching audiovisual content was via traditional, linear television². But there are clear differences in viewing habits between age groups. For example, those aged between 16 and 24 only spend 50% of their viewing time watching traditional linear television compared to 80% of 55-64 year olds.

¹ The UK Government recently published research into the incentives for online piracy, which identified lack of lawful offers as one of the top piracy incentives. Online copyright infringement tracker survey (5th Wave) IPO 22nd July 2015. <https://www.gov.uk/government/publications/online-copyright-infringement-tracker-survey-5th-wave>

² OFCOM Communications Market Report 6th August 2015. http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr15/CMR_UK_2015.pdf

On-demand services are increasingly used by consumers – in the first half of 2014, 56% of UK adults accessed at least one on-demand service compared to 27% of UK adults in the same period of 2010³. There are also clear age-related trends in propensity to use on-demand services – 74% of those aged between 16 and 24 accessed an on-demand service in 2014, compared to 49% of 55-64 year olds.

Furthermore, there is evidence that those in younger age groups are more likely to want to watch content from other countries. The 2015 Eurobarometer survey found that 8% of internet users in the EU (approximately 33 million people) have tried to access content intended for consumers in other Member States. The main reason for doing so was that the content was unavailable in their own country⁴. Although the proportion of consumers expressing a desire to watch content across borders is currently relatively low, the demographic most interested in watching content from other countries was viewers in the 15-24 age range category, in which 17% had tried to access content intended for consumers in other Member States.

These trends indicate that we need to plan for a future in which internet delivery of audiovisual content is increasingly common, and where consumers will increasingly expect to be able to access content on-demand, online and without borders.

Overall approach to the review of the Directive

In this context, we welcome the Commission's consultation on the Directive. It has been over twenty years since the Directive entered into force, and it is right to reflect on its effectiveness and explore whether we can draw lessons from it to improve the conditions for content provision across borders in the digital age.

Content provision and creation is a complex ecosystem, the results of which are of huge cultural and economic benefit to the EU. We must be sure that any copyright reform proposals have the promotion of creativity at their heart, ensure fair competition and consumer choice, and are fit for a digital future.

Any simplification of licensing arrangements should support the development and expansion of services and the success of the EU creative sector, not hinder its development. Whatever action is taken, it will be important to ensure that service providers remain able to tailor content to markets and audiences across the EU; that copyright licence fees continue to fairly reflect the audience that is being served; that content creators and producers continue to receive fair payment for their work; and that tools such as geo-blocking can be used where appropriate to stop people accessing content they have not paid for.

³ As above

⁴ Flash Eurobarometer 411 Cross Border Access to Online Content August 2015
<http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/F LASH/surveyKy/2059>

Achieving the right balance will require careful assessment of the evidence and a clear vision of the benefits a Digital Single Market can offer the EU. It also requires a holistic view of the necessary reforms to complete the Digital Single Market, as transaction costs from copyright licensing are not the only reason why service providers may not currently find it economically viable to service multiple markets in the EU. Other elements of the Commission's Digital Single Market Strategy that aim to make it easier to do business across borders within the EU may be equally relevant to digital content services.

We therefore encourage the Commission to continue to engage with all stakeholders, including those with current expertise of how the Directive is operating and those who may be impacted by any changes, including broadcasters, underlying rightsholders, distributors and service providers.

We also welcome the announcement of the legal and economic study into the functioning of the Directive to be published in Spring 2016. We urge the Commission to publish this research, and all underlying data including responses to this consultation, as soon as possible and in good time in advance of any legislative proposals.

Our comments on the individual consultation questions are set out below. We are pleased to be able to offer our initial comments and observations and look forward to working with the Commission on the issues raised by the consultation.

II. Assessment of the current provisions of the Satellite and Cable Directive

1. The principle of country-of-origin for the communication to the public by satellite

Satellite broadcasting is a very important component of the British television market, illustrated by the fact that digital satellite was the country's number-one viewing platform in 2013 - 42% of television-owning households⁵. Signal coverage for Sky and Freesat – the major providers of satellite services in the UK – extends to 98% of the UK's population⁶.

UK broadcasting stakeholders generally support the country-of-origin approach to clearing rights in satellite broadcasts and believe the current provisions are working well. They view the framework as “enabling” and as providing important legal certainty, including avoiding the risk of infringement through signal overspill. We are not currently aware of any particular problems experienced by broadcasters when clearing copyright licences for satellite broadcasting under this framework. In general, it appears that the country-of-origin rule provided by the Directive has been a positive single market intervention.

The UK Government agrees that it is important to understand the current state of supply of cross-border satellite services to consumers in the EU, noting that when the Directive was last reviewed in 2002 concerns were raised that the Directive had not in all cases had the intended effect of allowing consumers to receive (and pay for) satellite content across borders⁷. Unfortunately, we are not aware of data sources which would reveal the exact size of the audience outside the UK which receives content broadcast by satellite originating from a UK-based uplink or, conversely, the audience share within the UK which receives content broadcast by satellite originating from an uplink based in another Member State. We can, however, provide indicative data.

⁵ OFCOM International Communications Market Report 2014.
<http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr14/international/>

⁶ As above

⁷ Report from the Commission Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission /* COM/2002/0430 final.
http://ec.europa.eu/internal_market/copyright/satellite-cable/index_en.htm

With respect to the first question, OFCOM, the UK's communications regulator and body that awards broadcast licences⁸, has estimated that in 2013 around 160 companies held broadcast licences in the UK for services that were available outside the UK.

With respect to the second question, OFCOM notes that approximately 500 channels are available to viewers in the UK via the four main TV platforms - Freeview, Freesat, Sky and Virgin. Of these, 35 channels (39 including HD equivalents) representing 7% of the available channels, are not licensed by OFCOM (i.e. are under the jurisdiction of another Member State). However, it is not possible to make any conclusive statements on the provenance of this content as this data is not collected.

With regard to other obstacles that may impact on broadcasters' ability to offer cross-border satellite services, the Commission will be aware of the facts underlying the Court of Justice's judgment in Joined Cases C-403/08 and C-429/08 Football Association Premier League Ltd v QC Leisure and Murphy v Media Protection Services Ltd which, among other things, considered the export from one Member State to another of satellite decoder cards and whether contractual arrangements preventing "passive sales" of satellite decoder cards complied with EU competition law.

Given the ongoing DG Competition inquiry into contractual restrictions which affect cross border provision of pay TV services there is an opportunity to clarify the law in this area, and the UK Government encourages a joined-up and evidence-based approach to these overlapping issues.

2. The management of cable retransmission rights

The UK Government is not aware of any evidence that the cable retransmission regime in the Directive has created problems in the UK. UK stakeholders have not reported any particular problems, other than noting that the implementation of the CRM Directive should be beneficial in improving the transparency of the operation of Collective Management Organisations (CMOs) overall.

As far as the UK Government is aware, the Directive appears to have achieved its goal of facilitating the clearance of copyright and related rights for the simultaneous retransmission by cable of programmes broadcast from other Member States and is an example of where action was necessary at EU level. The UK Government is aware of some examples of the use of the provisions to retransmit UK-derived signals – for example the provisions are used for the retransmission of BBC channels

⁸ Note that services may hold an OFCOM licence because they are established in the UK and/or have their satellite uplink in the UK. However, this OFCOM data is not limited to satellite services (i.e. includes cable as well) and is self-reported. There is no requirement for licence applicants to indicate which country they are targeting or where their service might be available to obtain a licence and data may not be standardised

into Belgium and the Netherlands. Income from cable retransmission is of significance to UK rightsholders. For example, the Authors' Licensing & Collecting Society received income of £4.5m in 2014– 2015 from cable retransmission to be distributed to UK rightsholders, representing around 15% of their total income⁹.

In the time available, and similarly to the situation with satellite services, the UK Government was not able to gather evidence on the extent to which signal from outside the UK is being retransmitted in the UK via cable. The impression is that the mechanism is used minimally, if at all for cable content in the UK.

⁹ Authors' Licensing & Collecting Society Annual Report and Accounts 2014 – 2015.
<http://www.alcs.co.uk/CMSPages/GetFile.aspx?nodeguid=d4bba528-c4ba-4dbd-9627-892e4c5fe4ef>

III. Assessment of the need for the extension of the Directive

1. The extension of the principle of country-of-origin

As indicated above, the UK Government believes it is right to ask whether the Directive's rules on copyright licensing could inform the simplification of licensing in other areas of content delivery, if this would help more content come onto the market across the EU for consumers to purchase, address gaps in provision, and reduce incentives for piracy.

Country-of-origin models, often in combination with minimum harmonisation, have been found in a number of single market areas to be a valuable tool to support cross-border trade and simplify regulatory burdens on businesses. The UK Government recently submitted evidence to the Commission in support of our view that the country-of-origin principle in the Audiovisual Media Services Directive has been instrumental in providing the legal certainty that broadcasters need to operate across borders and has contributed to the vibrancy of broadcasting in the EU. As we noted above, the country-of-origin principle in the Directive also appears to have achieved its objective of simplifying satellite broadcasting in the EU.

However, further evidence collection and impact assessment is needed to determine whether similar benefits would flow from extending the country-of-origin principle to online transmissions or other broadcasting technologies. In this context, we would like to make the following observations, based on our conversations with stakeholders.

Potential benefits and risks to broadcasters

A number of broadcasters have highlighted the benefits of operating under the copyright system of the jurisdiction in which they are based and that they best understand. For example, a broadcaster may be confident that they are not infringing copyright by broadcasting a satirical clip because of the fair dealing parody exception in the UK but may be less confident of the legal situation in another Member State. Some broadcasters also note that as they are already able to negotiate in a single process the copyright licences for satellite broadcasts covering more than one territory, it would be beneficial to be able to do the same for catch-up services in multiple territories as well, given that catch-up services are now a consumer expectation. These broadcasters would find a licensing regime that allowed them to clear both sets of rights together beneficial.

Furthermore, some broadcasters have cited difficulties in identifying the holders of underlying rights in broadcast content when broadcasting in a new territory within the EU – something which they claim is particularly problematic in relation to music. The problem does not appear to arise with satellite broadcasting as the underlying rightsholders are compensated for broadcasts into all territories through one licence payment. Therefore, some UK broadcasters and service providers are supportive of

an extension of the country-of-origin principle as they feel it would make it easier for them to make content available across borders.

Other broadcasters, who in some instances already provide cross-border services, are not convinced that the country-of-origin principle needs to be extended. They argue that a significant number of services are already available in multiple territories and across the EU, and that this has been possible under the current framework. They are concerned that intervention could alter the existing balance between players and undermine incentives to invest in the production of new content, to the ultimate detriment of the consumer.

Fairness to creators and rightsholders

The Government is supportive of reforms that reduce transaction costs, as this should in theory lead to more money being available to invest in the production of content and new ways of content delivery. However, a country-of-origin mechanism should not be a “back-door” mechanism to unfairly reduce copyright licence fees and the Commission should seek to avoid interventions that concentrate negotiating power in a single party, noting concerns from some stakeholders that it can be very difficult to accurately value content at different stages of its life cycle and negotiate an appropriate price up-front. It is therefore important that any evidence arising from this consultation regarding problems determining licence fee values on a country-of-origin basis for satellite content are given careful consideration.

Recital 17 of the Directive sets out that licence fees should take into account the actual and potential size of the audience, including the language version. This principle must be maintained. It means that a provider will not, and should not, have to buy a licence that allows them to broadcast to the entire population of the EU, which would be prohibitively expensive for many. Services will usually be targeted towards a specific audience, through use of encryption or other mechanisms, and even if available without restriction will not be of interest to many EU consumers. This principle also means that a provider looking to expand to serve a new territory or audience will need to negotiate a licence that reflects this change and ensures adequate remuneration is paid to relevant rightsholders. There are also different mechanisms used to calculate appropriate remuneration for the making available of content, whether on a per-use basis or an up-front payment, and these complexities will also need to be considered.

Ensuring a level playing field

In general, the UK Government believes that copyright law should be technologically neutral. Designing truly technologically neutral legislation with the best chance of being future-proof necessitates a thorough understanding of existing technologies, to be sure that intervention is not inadvertently favouring or counting against a technology because of its mode of operation. The UK Government’s starting point is that it would be concerned about a copyright intervention that benefited one set of operators or one mode of content delivery over another – for example, if a country-of-origin clearance mechanism for licensing was extended to public sector broadcasters

but not commercial providers. This would not provide a level playing field or promote fair competition.

Defining “country-of-origin”

As noted in the consultation, were the scope of the Directive to be extended to cover online services, it would be necessary to set out how country-of-origin should be defined for an online transmission, a subject on which the Commission’s legal study has already identified a number of options¹⁰. The UK Government looks forward to the Commission’s forthcoming proposal on copyright portability, which will also need to address this question although from a different angle. The UK Government’s preliminary view is that it would be difficult to construct a definition of country-of-origin for the online environment that relates to a specific technical act in the transmission process (analogous to the satellite up-link). It may be more appropriate to consider approaches related to the jurisdiction in which the service provider is established and take an approach similar to that of the Audiovisual Media Services Directive.

However, any definitions or jurisdictional requirements must guard against the risk of forum shopping, as without safeguards, distributors might choose to base themselves in a country where the regulatory regime is considered favourable to them in some way that may be detrimental to others in the supply chain. Country-of-origin should not mean that a provider is able to buy cheaper licences in one country to target another country – pricing should be determined by the actual audience being targeted, as it is currently for satellite services. Nevertheless, the UK Government is not aware of any evidence that the existence of the Satellite Cable Directive has led to forum shopping and in general believes it unlikely that a provider would make a decision on where to locate solely because of the copyright legislation.

Aligning the enforcement framework

Ensuring we have a framework that permits effective enforcement of IP is a priority for the UK. Rightsholders will only be willing to make their content available across the EU if they are confident that their rights can be effectively enforced. It may be necessary to clarify the jurisdiction where an infringement takes place, taking into account relevant existing case law. As enforcement implications are not explicitly covered in the consultation, the UK Government urges the Commission to consider jurisdictional questions in the forthcoming enforcement consultation.

Further harmonisation

Finally, although we are aware that some have argued that it would be necessary to harmonise some aspects of copyright in more detail, such as the rules around ownership, the UK Government is not convinced this is necessary for a country-of-

¹⁰ Study on the application of Directive 2001/29/EC on copyright and related rights in the information society 2013 http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

origin principle to be effective. It looks forward to considering any evidence brought forward by this consultation.

2. The extension of the system of management of cable retransmission rights

An important feature of the Directive is that it provides a “one-stop shop” copyright and related rights clearance system for works to be broadcast via satellite or retransmitted via cable. With respect to cable retransmission, this is achieved by the compulsory use of CMOs. This section of the consultation seeks views on the extension of this clearance system to online retransmission. Detailed questions are posed on specific technologies and the ease of clearing rights in different situations, on which the UK Government is unable to comment at this stage. The UK Government looks forward to analysing evidence from broadcasters on these questions.

Fair remuneration for creators and performers

The UK Government is aware that some stakeholders have argued that an extension in some form of the cable retransmission mechanism to online is necessary to ensure that creators and performers are able to obtain a fair proportion of the value from the content they create. They argue that it is not always possible to assess upfront the value of rights or accurately predict levels of use. They emphasise the importance of on-going secondary payments in ensuring that creators receive a share of the value generated by the exploitation of copyright content.

The UK Government notes these concerns and agrees that reform should not undermine the negotiating position of creators or unfairly deprive them of revenue. However, the Directive’s approach to this issue, which was developed in a specific historical and technological context, may not necessarily be the best way to approach it today in the online environment. We look forward to ongoing engagement with the Commission as it continues to further develop policy in this area, noting the recent publication of its research¹¹ and forthcoming report in the print sector.

Any consideration of this issue should take into account the need to strike a balance between protecting creators and ensuring there are mechanisms in place to allow them to benefit from future exploitation of their works, the freedom of parties to negotiate contractual terms that best suit their circumstances, and the need to avoid over-regulation to support the efficient functioning of markets.

¹¹ Remuneration of authors and performers for the use of their works and the fixations of their performances 24th July 2015 <http://ec.europa.eu/digital-agenda/en/news/commission-gathers-evidence-remuneration-authors-and-performers-use-their-works-and-fixations>

Role of CMOs

It is undoubtedly true that CMOs can create significant efficiency advantages, not least in terms of reducing transaction costs for both rightsholders and licensees and facilitating the smooth progression of revenue streams. There may be considerable potential efficiencies in extending the existing “one-stop shop” to online retransmission of broadcasts.

However, and without prejudice to the efficiency arguments noted above, we note that CMOs can enjoy considerable market power. We would therefore welcome the Commission, as part of its review of the Directive, giving due consideration to the competition dimension of the existing one-stop shop licensing system as well as its potential extension to cable retransmissions in terms of the compulsory use of CMOs. To be clear, we are not aware that any competition concerns have been raised about CMOs under the Directive, but it is nevertheless important to ensure that the interface with competition is properly considered.

Relation to CRM Directive

We also note the recent adoption of 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 (the CRM Directive). We would also encourage the Commission to explicitly discuss the relationship between the two Directives in future communications relating to its review of the Satellite and Cable Directive.

Extended collective licensing

On a related note, the consultation asks about the potential of extended collective licensing (ECL) as an alternative to mandatory collective licensing for the simultaneous retransmission and/or transmission of TV and radio programmes on platforms other than cable. The UK supports the availability of ECL as a method of simplifying rights clearance where right holders are properly protected, and where it makes sense for the market. Accordingly, the UK's provisions on ECL set out that a scheme can only be approved where the relevant CMO meets a series of criteria in its application, including by providing details of how it will allow rights holders to opt out, and evidence of significant representation in relation to the types of works affected by the proposed scheme.

The potential impact of using ECL to facilitate simultaneous transmission would therefore depend to a large extent on the capacity of CMOs to operate efficient schemes that provide adequate safeguards and reassurances for rightsholders. This would include demonstrable compliance with the relevant provisions of the CRM Directive. In practice, this means there would need to be a full assessment of ECL's suitability for this purpose in each case, including whether the mechanism would be effective for the specific circumstances of simultaneous transmission and the timescale in which it would be necessary to clear rights.

3. The extension of the mediation system and the obligation to negotiate

In the time available, the UK Government was not able to gather any evidence on how the mediation system has been used and is therefore unable to comment.

IV. Other issues

The UK Government would like to reiterate the points made in the preamble about the need to ensure proper assessment of evidence, including that gathered from previous consultations.

As noted above, it is also necessary to take a holistic view of Digital Single Market reforms, as transaction costs from copyright licensing are not the only reason why service providers may not currently find it economic to serve multiple markets in the EU. Other elements of the Digital Single Market Strategy that aim to make it easier to do business across borders within the EU may be equally relevant to digital content services. In particular, these include updating the Audiovisual Media Services Directive in order to better support cross-border service provision, and delivery of effective intellectual property enforcement across the EU. This is important, as businesses will only be willing to make content available more widely in the EU if they are confident they are able to enforce their rights appropriately.

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Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000
Email: enquiries@bis.gsi.gov.uk

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