

**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 \*/**

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

TABLE OF CONTENTS

1. Introduction

2. Implementation of the Directive into national law

2.1. Implementation times

2.2. Characteristics of implementation

2.2.1. Provisions relating to satellite broadcasting

2.2.2. Provisions relating to cable retransmission

3. Practical application of the Directive

3.1. Reminder of certain principles

3.1.1. The footprint parameter in the management of copyright and related rights linked to satellite broadcasting

3.1.2. The specific nature of contractual relations in the context of cable retransmission

3.1.3. A more effective framework for the mediation process

3.2. Reflections on the improvement of certain mechanisms

3.2.1. Facilitation of negotiations concerning cable retransmission

3.2.2. Introduction of a one-stop shop in the context of cable retransmission

3.2.3. Rationalisation of the management of rights relating to the installation of shared dishes

4. The future of the Directive in the context of new media

4.1. Diversification of national broadcasting methods

4.2. Diversification of cross-border retransmission methods

5. Conclusion

## 1. Introduction

Both the completion of the internal market and technical developments enabling television transmissions to be broadcast beyond national borders have led to the concept of a European audiovisual area, as embodied in Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1], as amended by Directive 97/63/EC of the European Parliament and of the Council of 30 June 1997 [2] (henceforth referred to as the "Television Without Frontiers" Directive).

[1] OJ L 298/23, 17.10.1989.

[2] OJ L 202/60, 30.7.1997.

This Directive lays down the legal framework for the free provision of television services in the European Union, with a view to fostering the development of a European market (principles of the freedom to receive and retransmit television programmes). To this end, it coordinates at Community level, certain provisions of the Member States relating to the exercise of certain television broadcasting activities in areas such as determining the law applicable to broadcasting bodies, promoting the distribution and production of European works, access to major events, television advertising, sponsorship, teleshopping, the protection of minors and public order, and the right of reply.

However, despite this instrument, the cross-border broadcasting of television programmes by satellite and their retransmission by cable from other member States was still being hampered by a degree of legal uncertainty arising from disparities in the national provisions on copyright. This legal framework had to be completed as regards copyright.

A Community audiovisual area could not in fact take concrete shape without effective protection for copyright and related rights. Indeed, such protection is a factor which favours the creation of new works within the European Union by enabling the right holders and users to benefit fully from the European dimension of broadcasting. Moreover, this protection, which sometimes takes the form of an exclusive right, helps to avoid a situation in which right holders are implacably opposed to the broadcasting or re-broadcasting of programmes beyond national borders, and thus avoids fragmentation of the internal market.

The protection of rightholders had been provided for in international agreements: the Berne Convention for the Protection of Literary and Artistic Works (as amended by the Paris Convention) and the Rome Convention, which concerns the protection of authors, producers of phonograms and broadcasting organisations. However, as these conventions were not aimed at eliminating the obstacles to cross-border broadcasting created by differences between the legislations of the contracting States, Council Directive 1993/83/EEC of 27 September 1993 [3] on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (referred to in the text as the Directive) set out to ensure greater legal certainty, on a contractual basis, for two transmission methods which make cross-border broadcasting possible, namely satellite broadcasting and cable retransmission.

[3] OJ L 248, 6.10.93.

As the deadline for the implementation of the Directive in the national legal systems of the Member States was 1 January 1995, its impact can be assessed on the basis of a certain duration of application, in accordance with Article 14(3) of the Directive. To this end, a study carried out for the Commission in 2000 [4] and numerous contacts during 2001 with representatives of the various parties affected by the application of this Directive have provided input for this report.

[4] by the AIDAA (Association Internationale des Auteurs de l'Audivisuel - International Association of Audiovisual Writers and Directors) available at [www.europa.eu/int/comm/internal\\_market](http://www.europa.eu/int/comm/internal_market)

Recent years have seen the media and technological environment undergo major changes which have underlined the importance of satellite and cable in the broadcasting of television programmes. It is estimated that, in 2000, more than 50% of homes in the European Union had access to cable (30.6% were subscribers), and that 20% were equipped for direct reception via satellite or equivalent reception. It is also interesting to note that, taking cabled homes and those with direct-reception satellite dishes together, an estimated 50% of homes in the European Union receive a multi-channel television offering [5].

[5] Statistical Yearbook 2001 - Film, Television, Video and New Media in Europe. Published by the European Audiovisual Observatory.

Thus, in order to determine whether new guidelines will have to be adopted for the future, it is essential to go beyond an analysis of implementation into national law and examine the practical application of the Directive. The future of this instrument also has to be gauged in the light of the new media environment in which the programmes offered will represent a key factor in the competitive arena. More than ever before, it will be a question of providing appropriate protection for the relevant copyright without jeopardising the benefits which are inherent in a genuine internal audiovisual market, both for the economic operators active in the sector and for a general public geared more and more towards a transnational market.

## 2. Implementation of the Directive into national law

The analysis relates to implementation times and to the content of national provisions.

### 2.1. Implementation times

The Directive had to be transposed before 1 January 1995. However, Belgium was the only Member State to meet that deadline. The majority of implementations took place between 1995 and 1998, but Ireland and Luxembourg were late in implementing their relevant measures, which did not enter into force until 1 January 2001 and 19 July 2001 respectively.

Given this situation, the provisions of Article 7 of the Directive governing the transition between the old national systems for the protection of copyright and related rights and the application of the country-of-origin principle for satellite broadcasting have still not yet been transposed, the maximum period allowed being five years.

### 2.2. Characteristics of implementation

#### 2.2.1. Provisions relating to satellite broadcasting

The provisions of Articles 2 and 3 of the Directive on the transfer of copyright and related rights with regard to satellite broadcasting have been correctly transposed into all national legislations. However, this positive statement must be qualified by the fact that their application by the interested parties is not in line with the country-of-origin principle laid down in the Directive (see point 3.1.1).

It should be noted that the possibility, provided for in Article 3 of the Directive, of extending a collective agreement to rightholders of the same category has been incorporated only in the national law of those Member States where such an extension already represented a well established practice.

#### 2.2.2. Provisions relating to cable retransmission

- Articles 8, 9 and 10

The Directive lays down the principle of a contractual relationship between holders of copyright and related rights and cable operators (Article 8), with the former being able to exercise their exclusive right only through a collecting society and such collective management also benefiting non-members in the same category (Article 9).

The mandatory collective management of rights clearly impairs the freedom of rightholders, in that the transfer of their rights is subject to regulation. At the time the Directive was adopted, it fulfilled a need for a balance between the exercise of the exclusive right and an assurance for the cable operator that all copyright and related rights had been acquired for the programmes being retransmitted, due in particular to the extension of collective management to non-members, which guaranteed the cable operator complete representation of the collectively managed material.

Article 10 takes into account the particular situation of broadcasting organisations. These are, in effect, both holders of exclusive rights to their own programmes and acquirers of rights for the initial broadcasting of the programmes which they have acquired. In this context, they have been given latitude to negotiate the acquisition of rights for the retransmission of programmes, without rightholders being mandatorily represented by a collecting society.

The consequence of this alternative is that a broadcasting organisation may acquire all cable retransmission rights and thus be the sole party dealing with the cable operator. To the extent that authors retain the right to transfer to a broadcasting organisation the right of retransmission, the exercise of the transfer of this right must, within the framework of national law, logically entail a negotiation, namely the acquisition of a consideration on the part of the other party to the contract. In this case, it is the payment of a certain price by the broadcasting organisation to the rightholders themselves or to a collecting society representing them. Collecting societies cannot demand a related payment from cable operators.

An examination of national legislation shows that the provisions of the Directive concerning payment in respect of cable retransmission rights have been correctly transposed in all Member States.

However, the full effect of Article 10, i.e. the existence of an alternative to the principle, set out in Article 9, of negotiations between collecting societies and cable operators, is considerably weakened in German legislation. The introduction of the right to an equitable remuneration of authors which can be paid by cable operators only through a collecting society does not allow a sole contract to be concluded between the broadcaster and the cable operator and can make negotiations on cable retransmission more difficult in Germany than in the other Member States.

- Articles 11 and 12

More generally, the principles of mediation and good faith have been correctly transposed, taking account, in certain cases, of instruments already operational in some Member States.

For instance, in some Member States the mediator is understood to be an arbitration board or committee made up of several members. In most cases, this terminology has no impact on the organisation of mediation, as the solution remains an option and not a requirement. In other countries, third parties are chosen by mutual agreement between the parties concerned, without any list having been drawn up in advance. An even more flexible system comprises the sole obligation to negotiate, which does not rule out the parties having recourse to a mediator at a later stage.

As the principle of good faith is a legal principle in a number of Member States, its implementation has not created any difficulties and has been complemented by the possibility of consulting the competent authorities to find out about cases of arbitrary refusal of retransmission by cable, where such bodies were already in place prior to the entry into force of the Directive.

The examination of national implementation measures has thus generally produced satisfactory findings, but some difficulties are directly linked to the practical application of the Directive.

### 3. Practical application of the Directive

Generally speaking, it appears that the mechanisms put in place by the Directive contribute to the cross-border broadcasting of television programmes. It would nevertheless appear worthwhile to reiterate some of the established principles and to present lines of thought aimed at improving some of the mechanisms.

### 3.1. Reminder of certain principles

#### 3.1.1. The footprint parameter in the management of copyright and related rights linked to satellite broadcasting

The object of the Directive, with the definition of the notion of communication to the public by satellite at Community level, was to put an end to the legal uncertainty regarding the rights to be acquired, by specifying the place where the act of communication occurs and the copyright legislation applicable to contractual relations regarding the transfer of rights. The applicable law is that of the Member State in which the programme-carrying signals are transmitted; its application extends beyond national borders into the Member States in which the signals are received (although, in technological terms, the footprint covers many areas other than those of the Member States, the term "footprint" in this Report refers only to the territory of the Member States). This principle avoids the cumulative application of several

national legislations of the various Member States covered by the footprint (recitals 14 and 15) [6].

[6] (14) Whereas the legal uncertainty regarding the rights to be acquired which impedes cross-border satellite broadcasting should be overcome by defining the notion of communication to the public by satellite at a Community level; whereas this definition should at the same time specify where the act of communication takes place; whereas such a definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting; whereas communication to the public by satellite occurs only when, and in the Member State where, the programme-carrying signals are introduced under the control and responsibility of the broadcasting organisation into an uninterrupted chain of communication leading to the satellite and down towards the earth; whereas normal technical procedures relating to the programme-carrying signals should not be considered as interruptions to the chain of broadcasting; (15) Whereas the acquisition on a contractual basis of exclusive broadcasting rights should comply with any legislation on copyright and rights related to copyright in the Member State in which communication to the public by satellite occurs;

Recent years have seen a proliferation of television channels, a large number of which are encrypted and accessible by subscription only. However, even if a viewer located outside the Member State in which transmission is organised is prepared to make the requisite payment, they often receive a negative response from the broadcasting organisation concerned, as the latter does not hold the copyright relating to broadcasting in the Member State in question. The absence of a transfer of rights may result in the absence of an economic interest on the part of the broadcasting organisation in ensuring that its programmes are broadcast outside its national market (given the reduced audience) or in the absence of a willingness to transfer on the part of the rightholders.

This is a problem which affects the European citizen's direct perception of the reality of the internal market in his daily life and which thus has an appreciable negative impact in terms of cultural, linguistic, social and economic interpenetration at the intra-Community level.

It should be pointed out that viewers are unable to access not only programmes transmitted by pay-TV channels, but also those of uncoded channels, which include not only private broadcasting organisations but also public-service broadcasters. The Commission has received a number of complaints from private individuals, as well as questions from the European Parliament on this subject.

A trend is thus emerging whereby producers sell their programmes to broadcasting organisations on condition that satellite transmissions are encrypted so as to ensure that they cannot be received beyond national borders. This encryption enables producers to negotiate the sale of the same programmes with broadcasting organisations in other Member States.

However, the principle laid down by the Directive, in keeping with the logic of the internal market, envisages the transfer of rights, under the law of the country in which the communication is introduced, for the entire footprint: in practice, a transfer on a national basis has the effect of fragmenting the market and runs counter to the principle of the Directive.

The fact that the Directive provides for the transmission of programme-carrying signals (Articles 1 and 2(c)) in encrypted form does not lessen the scope of the principle of the transfer of the rights in the country of introduction of the communication for the entire footprint: whether transmission is unscrambled or encrypted, the footprint can serve as the basis for exploiting the rights.

It is particularly interesting to note that the encryption of programmes is a factor in favour of fairer remuneration for rightholders, to the extent that a decoder has to be made available to the viewer (whether a subscription has been paid or not), which makes it possible to check very accurately the size of the actual audience.

The Commission wishes to emphasise 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 rightholders or the collecting societies representing them and the broadcasting organisations, relating to the entire footprint, are compatible with the principles of the internal market.

In this respect, compliance with the principle of the Directive, accompanied by the development of open-access or interoperable systems, as well as the growing trend towards moderately priced reception systems (such as parabolic antennas) are elements which are likely to facilitate European citizens' access to television programmes broadcast by satellite. Furthermore, the battle against piracy would be reinforced in that the illegal use of certain means (such as the illegal manufacture of chip cards or the distribution of access codes via the Internet) would no longer provide the only way of accessing certain programmes.

Complete application of the principle of the Directive, which involves moving beyond a purely national territorial approach, should therefore be encouraged in order to allow the internal market to be a genuine market without internal frontiers for rightholders, operators and viewers alike. The Commission will therefore conduct research and engage in consultations, in particular with the various sectors concerned, in order to determine how to reconcile the different interests involved with the principle of the free movement of television services.

### 3.1.2. The specific nature of contractual relations in the context of cable retransmission

- The objective of the Directive is to ensure that audiovisual programmes are broadcast while guaranteeing remuneration for holders of copyright and related rights, on the basis of an extended collective management system.

Some rightholders feel they are in part adversely affected by the mandatory collective management of rights, as it results in their losing income and is not conducive to the best possible defence of their own interests, such as could be achieved by individual negotiation. To be sure, under its remit, a collecting society cannot seek to differentiate or to obtain greater advantages for certain rightholders among those it represents.

However, an extended system of mandatory collective management ensures legal certainty as regards the settlement of fees for all rightholders and remains an essential principle in the context of retransmission by cable.

- As regards the alternative introduced by Article 10, this introduces a degree of flexibility which should meet the various needs of the parties affected by cable retransmission. At all events, it is for the broadcasting organisation to decide whether or not to become involved in the transfer of cable retransmission rights which do not belong to it as such and whose acquisition for a particular retransmission is directly incumbent upon the cable operator.

According to the information available to the Commission, it would appear that this alternative is used to the greatest possible extent by a not inconsiderable number of broadcasting organisations, in that they acquire all the rights relating to the full set of programmes, both for initial transmission and for

retransmission by cable, and are therefore the sole party dealing with the cable operator.

In this situation, the position of some rightholders may appear more vulnerable, to the extent that they are not mandatorily represented by a collecting society. This fear must be counterbalanced by the principle that the transfer of a right may not take place unless equitable remuneration [7] is obtained, in accordance with the contractual possibilities introduced by Directive 93/83/EEC.

[7] Article 11(a) of the Berne Convention.

Thus, a right to remuneration which can be managed only by a collecting society considerably lessens the scope of the instruments put in place by the Directive and would undoubtedly have an adverse effect on the internal market as, depending on the Member State in which the retransmission take place, the rightholders would not be placed on an equal footing.

Furthermore, the mandatory involvement of a collecting society constitutes a constraint liable to militate against the retransmission of programmes emanating from other Member States, while it ought to be possible for the rightholder to obtain equitable remuneration within the framework of its contractual relations with the broadcasting organisation, simply by virtue of a tariff schedule being drawn up and published by the national authorities.

The Commission therefore wishes to stress that the scope of Article 10 can only be complete and its full effect achieved if all aspects of the right linked to retransmission by cable fulfil both the management principles laid down in Article 9 and those of Article 10 of the Directive

### 3.1.3. A more effective framework for the mediation process

Since the introduction of cable, the question of payment for rights linked to retransmission has occasionally given rise to serious disputes.

Given this situation, and in order to counterbalance the principle of collective management of cable retransmission rights, the Directive incorporates the tool of mediation so as to enable a neutral person to become involved who might be able to end possible disputes and the temporary situations which they create.

This principle, which is in line with contractual freedom, nevertheless displays real weaknesses in actual practice.

- Its implementation depends firstly on agreement between the parties on the choice of mediator and the scope of the latter's remit, which is the subject of an initial round of negotiations. According to the information available to the Commission, some disputes have been ongoing for a number of years without any mediation process having been set in train.

It is therefore clear that in the absence of mandatory recourse to a mediation system, this particular approach is liable to remain little used.

- In the mediation context, it is the good faith of the parties to the dispute that determines whether the process runs its course satisfactorily and leads, within a reasonable timeframe, to a solution accepted by the two parties

In some disputes, several years may elapse between notice of termination of contract being given by one party and the initiation of the mediation process, during which time negotiations, followed through to a greater or lesser extent, may take place between the parties, with the non-terminating party not always showing diligence in its efforts to resolve the dispute.

It could therefore be appropriate to lay down, as is already the case in some Member States, the action to be taken after the serving of notice to terminate a contract, with reasonable but maximum time limits

being stipulated for each stage before the mediation process, in the strict sense of the term, comes into play. If, at the end of the set time limit, negotiations have not produced any results, and if no remuneration has been paid to the rightholders, it could be arranged that the portion of the cable operators' revenue corresponding to copyright and related rights in the terminated agreement is impounded in order to maintain the balance between the parties involved.

Thus, the possibility of direct negotiation, without the involvement of a third party, could be recognised over the course of a year, followed in the event of failure by a time limit of six months to draw up the mediation agreement.

Another provision favouring the prompt implementation of the process would be an obligation for national authorities to draw up and publish a list of mediators.

As the Commission has to carry out a study on new legal measures for settling disputes, such as mediation [8], this mechanism will be more widely adopted, taking due account of experience gained in the field of retransmission by cable.

[8] See recital 46 of Directive 2001/29/EEC on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.06.2001, page 10).

### 3.2. Reflections on the improvement of certain mechanisms

#### 3.2.1. Facilitation of negotiations concerning cable retransmission

It has emerged from meetings between the various parties involved in retransmission by cable and the Commission departments concerned that certain difficulties in the context of negotiations under Article 9 of Directive 93/83/EEC stem in particular from the large number of negotiators who may be present on either side of the table in some Member States.

In this respect, it is interesting to note that mechanisms designed to facilitate negotiations have already been put in place in some Member States.

##### - Overall negotiations

Within this particular framework, the parties concerned negotiate on retransmissions as a whole: collecting societies - representing authors, performers and audiovisual production organisations - and broadcasting organisations on one side, cable operators on the other.

This set-up offers the advantage that it brings all the parties together and makes it possible to establish a single remuneration for a particular work. Nevertheless, negotiations may be protracted, and if one party terminates the agreement the entire edifice collapses.

##### - Negotiations by rightholder category

In this set-up, negotiations take place between cable operators on the one side and a single category of rightholders on the other (either the collecting society representing authors, performers, phonogram producers or audiovisual production organisations, or the broadcasting organisation as the representative of a particular channel).

This alternative offers the opposite advantages and disadvantages to those resulting from an overall agreement: termination by one of the parties does not mean that negotiations have to be started anew for all rightholders, but the remuneration established may differ from one rightholder to the next.

##### - Extended collective licence

This is an arrangement whereby a collecting society representing a significant proportion of rightholders



in the same category negotiates on behalf of all rightholders with an association representing cable operators. The advantage is that the society thus mandated has strong negotiating power.

This idea of a collecting society mandated by all the collecting societies as a whole negotiating with an equivalent association representing cable operators depends on a certain line of negotiation having been laid down at the time of determining the respective mandates, which ought to facilitate discussions between the two mandated bodies. This set-up could be supplemented by back-up arrangements for termination of the agreement, whereby it could be terminated only if the majority of the members of one of the associations so decided.

The question can also be asked as to whether it is appropriate for such a mandated body to become involved as an appeal mechanism in a situation where the direct representatives of rightholders have not succeeded in the first instance in concluding an overall agreement with cable operators, or where notice has been served to terminate the contract.

It is not for the Commission to set negotiating conditions, as this would jeopardise the principle of contractual freedom, but it is not indifferent to the difficulties encountered and can but encourage initiatives designed to improve negotiating conditions.

### 3.2.2. Introduction of a one-stop shop in the context of cable retransmission

As already mentioned, some broadcasting organisations manage the acquisition of all cable retransmission rights on behalf of the cable operator, who remains legally responsible for the acquisition of such rights.

For the broadcasting organisation, this procedure means that negotiations take place in accordance with the copyright in force in the Member State in which retransmission takes place. Even if, when the rights for initial transmission are transferred, the broadcasting organisation can simultaneously acquire the rights for retransmissions by cable, the requisite contractual procedures then have to be followed at national level for each retransmission, in accordance with the law of each Member State in which retransmission takes place.

This possible proliferation of contractual relations has resulted in the presentation to the Commission of a plan for a "one-stop shop". This role would be played by the broadcasting organisation.

The broadcasting organisation would be obliged to negotiate, with the collecting societies of a single Member State (in accordance with the law applicable in that country), an "all rights acquired" contract which would determine the remuneration for initial transmission and also lay down, in principle, the payment of a certain percentage of the sales deriving from retransmission by cable for the other territories. This remuneration would have to be paid once actual retransmission had taken place. Where a contract was concluded between a cable operator and the broadcasting organisation, the latter would inform, and organise remunerations for, the collecting societies with which it had negotiated the framework agreement. These societies would be responsible for passing on to the members concerned the information in question, as well as the sum linked to the retransmission, together with the information required to divide up the amount concerned among the rightholders.

Attractive though it may be in the context of the internal market, the concept of the one-stop shop cannot be given tangible form by a mechanism which relies on a broadcasting organisation, as the legal responsibility and financial commitment associated with the retransmission rights and initially incumbent upon the cable operator might be too much of a burden for some broadcasting organisations. It would amount to setting up a one-stop-shop system with the risk that it would be an empty shell in view of the specific difficulties involved in its implementation which would be faced by some broadcasting organisations when it came to determining the remuneration.

The one-stop shop for the transfer of cable retransmission rights represents a major project and is in keeping with the dynamic impetus of the internal market. It therefore needs to be the subject of in-depth

consideration, particularly in a more horizontal context linked to developments induced by the emergence of the information society in which the established principles for the transfer of rights will have to undergo change.

### 3.2.3. Rationalisation of the management of rights relating to the installation of shared antennas

With more and more apartment blocks being built, there is an increasing trend towards the installation on such buildings of parabolic antennas together with their associated internal systems (cables, distribution/switch panels) enabling residents to receive satellite TV programmes [9].

[9] It should be remembered in this context that the Commission adopted, on 17 June 2001, a communication concerning the application of the principles of the free movement of goods and services to the use of parabolic dish antennas. It cites the "right to satellite reception" which every private individual within the internal market must have (COM (2001) 351).

In some Member States, installers of parabolic antennas have to pay a fee when they install a communal antenna, as such an installation is recognised as representing a new act of communication to the public.

Case law on this subject differs among the Member States. For instance, while it is generally considered that the installation of such an antenna at a hotel represents a new communication (as installation is carried out for business purposes), this conclusion is not arrived at across the board, with some national courts taking the view that such an installation in the context of a private jointly owned property does not constitute a communication to the public and is not subject to the payment of fees in respect of copyright and related rights.

When asked to give a preliminary ruling [10] concerning such an installation in a hotel, the Court of Justice clearly took the view that this question did not fall within the scope of Directive 93/83/EEC and that the case had to be decided on the basis of national law.

[10] Judgment of 3 February 2000 in Case C-293/98.

In the context of this case, the Court of Justice referred to Article 3(1) of the Commission's proposal, which remained the same Article in Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. This provision, aimed at transposing into Community law, Article 8 of the World Intellectual Property Organisation's 1996 Treaty on Copyright, states as follows: "Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them".

Under Directive 93/83/EEC, when rights are acquired in relation to satellite broadcasting, due account must be taken of, amongst other things, the actual and potential audience. One of the parameters for estimating this audience should therefore be the number of signal reception installations on the ground, i.e. parabolic antennas supplemented by internal installations enabling the number of connected homes per building to be accurately determined.

However, as the concept of "public" has not been defined at either international or Community level, the fees payable in respect of rights relating to satellite broadcasting, including or not including those which can be linked to installations in apartment buildings, are determined in accordance with national laws.

In this regard, it has to be stated that the payment of fees in the Member State in which the collective installation takes place constitutes a barrier to the free movement of broadcasting services [11]. This affects both the recipients of these services, i.e. the viewers concerned, as it tends to make the use of parabolic antennas and access to programmes broadcast on a cross-border basis more expensive, and the suppliers, as the reception of their satellite broadcasts is rendered less attractive. When even the protection of intellectual property represents a public interest objective recognised by the Court of Justice,

the question arises as to the proportionality of such measures in ensuring this protection.

[11] See the judgement of 29 November 2001 in Case C-17/00, *De Coster*

The Commission regards the protection of copyright and related rights - solely in the context of satellite broadcasting - as being in compliance with the internal market, provided the amount of the associated fees is determined in particular on the basis of the audience figure. The Commission therefore encourages Member States to take the measures necessary to ensure that rightholders are afforded full protection by dint of the fees linked to satellite broadcasting being determined on the basis of very precise criteria related to audience size.

#### 4. The future of the Directive in the new media context

The context in which the media are evolving has, of course, changed enormously since the entry into force of the Directive, with the emergence of more broadcasting organisations, new media and formats - hence the current proliferation and diversity of programmes.

Numerous lines of thought concerning those developments relate specifically to the advent of digital television, which is already firmly established on the satellite and terrestrial fronts and is set to extend to cable transmissions soon.

This technological progress will not be discussed further in this report: it does not affect the principles of the Directive, which remain equally applicable whether a transmission is analog or digital. By contrast, the extension of the Directive to transmission methods other than those already covered must be analysed.

##### 4.1. Diversification of national broadcasting methods

It can be stated firstly that, at the level of the Member States, terrestrial means of communication no longer dominate broadcasting, as satellite technology comes increasingly to the fore.

However, under Article 3(2) of the Directive, a Member State may provide that a collective agreement between a collecting society and a broadcasting organisation may be extended to rightholders of the same category who are not represented by the collecting society, provided that the programmes are broadcast simultaneously by satellite and terrestrially. Where at present, programmes are in some cases transmitted via satellite only, an amendment to the Directive could be proposed to take this into account if the Directive needed to be changed more substantially.

##### 4.2. Diversification of cross-border retransmission methods

Beyond satellite broadcasting, development is at varying stages of advancement on retransmission by microwave channel of digital programmes, retransmission of programmes via the Internet, and retransmission by satellite.

The question has therefore arisen as to whether it might not be appropriate to transpose, *mutatis mutandis*, the principles of the management of copyright and related rights applicable to retransmission by cable to other means of simultaneous cross-border retransmission, without changes, following the principle of technological neutrality.

In this regard, Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property [12], as well as Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [13] lay down that authors, performers, phonogram producers and broadcasting organisations hold exclusive rights or a right to remuneration for the various simultaneous retransmissions.

[12] OJ L 346, 27.11.92, p. 61.

[13] OJ L 167, 22.06.2001, p. 10.

- At the technological level, the conditions currently required for digital retransmission by microwave channel have similarities with the cable retransmission. However, it must be recognised that this method of retransmission is still in its infancy, and the Commission regards it as necessary to consider the more general conditions for developing this form of transmission before envisaging any extension of the current system of administering copyright and related rights for cable broadcasting.

- Since certain principles and conditions have been laid down for retransmission via the Internet by Directives 2000/31/EC [14] and 2001/92/EC, the Commission considers it more appropriate to reflect on how to administer the copyright and related rights for this form of retransmission in the framework already established by these two Directives, particularly since they are currently being transposed in the Member States.

[14] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 170, 17.7/2000, page 1.

- In the case of retransmission by satellite, in which a satellite distributor (who is neither a broadcasting organisation nor the satellite operator providing transport) includes in a single package a number of channels which have already had an initial broadcasting, rents transmission bands from a satellite operator and makes that package available to television viewers against payment of a subscription.

In this context, implementation of the principle of mandatory collection would amount to an equality of treatment in appearance only, as this approach would lead to different situations being dealt with in one and the same way. Retransmission by cable has a relatively restricted geographic reach (national or even local), and is thus not in the same league as satellite retransmission, which goes beyond Europe.

To impose the principle of collective management on retransmission activities would amount to limiting considerably the freedom of rightholders, who would no longer be able to object to the retransmissions in question. However, some of the programmes contained in these retransmissions are not only the subject of an act of communication in the broadcasting context, but may also be presented on other media, in accordance with a chronology designed to maximise potential remuneration in respect of the work concerned. It should be noted that the chronology for the various acts of communication for a particular work is organised on a national basis, depending on the initial success achieved in the Member State where the work was produced.

However, the retransmission of programmes in packages broadcast by satellite is part of this media chronology: to the extent that the technical means used ensure a vast reach for the method of retransmission concerned, a limitation on the exercise of exclusive rights would jeopardise this chronological chain and thus, to a certain extent, the potential remuneration in respect of a work.

The Commission does not therefore consider it appropriate, at this stage, to extend the mandatory collective-management regime to other categories of retransmissions.

## 5. Conclusion

The expansion of the range of televisual services on offer has not only not diminished, but has bolstered the scope of the mechanisms put in place by the Directive with the aim of facilitating some methods of cross-border transmission. Moreover, experience shows that the measures taken under the "television without frontiers" Directive to ensure freedom of reception and transmission of television programmes from other Member States see their effect diminished if the difficulties involved in transferring copyright and related rights are not resolved.

It is nevertheless evident that some principles in the Directive need to be examined in depth. The Commission is particularly concerned about the difficulties which citizens encounter in trying to access

satellite channels transmitted outside the Member State in which they are resident. This situation not only goes against the grain of a fundamental principle embodied in Directive 93/83/EEC, but also means that the freedom of movement of goods and services cannot be fully exercised, that viewers' expectations cannot be met, and that cultural and economic opportunities introduced by the internal market cannot be exploited. The Commission will therefore conduct a study - observing the protection of rightholders - into possible ways of meeting citizens' expectations, which are set to continue rising in step with increased mobility and the development of new technologies to which the general public has access in the European Union. The Commission therefore intends to start work, without delay, in close collaboration with the various interested parties and the representatives of the competent national authorities, thereby fostering a thorough, constructive and necessary debate on a clearly-defined objective whose achievement poses undeniable difficulties.

The evolution of television services in the framework of the information society leads the Commission to reflect on the need to adapt certain current mechanisms relating to the protection of copyright and related rights (settlement of disputes, role of collecting societies): the methods of managing rights to cable retransmission and mediation will thus be assessed in the general context of the evolution of the media in the information society, before considering whether or not to revise Directive 93/83/EEC. Finally, and more generally, ongoing technological developments (including digital television and the Internet) will generate a manifold increase in the possibilities and arrangements for the cross-border provision of audiovisual services. The audiovisual services that will be offered in the near future will lead to changes in viewers' habits through providing them with more individualised and personalised access to these services. It is too early, however, to gauge the content and impact of these changes and, hence, to determine at this stage whether it is necessary to extend the scope of Directive 93/83/EEC.