

Public consultation by the European Commission on piracy protection for services protected by conditional access systems

Contribution by EUROCINEMA
Association of film and television producers

QUESTION 1.1. Why do you think EU consumers would want to receive fee-based audiovisual services (whether news, entertainment, cultural or sports programmes) from EU countries other than the one in which they are resident? If this is merely to cater for when they are on business travel or holiday abroad, should the directive be retained?

Considerations of cultural diversity make it clear that each country must be able to organize its own audiovisual landscape in a way that addresses its population's needs. This means both free-to-air and encrypted channels. This imperative must be borne in mind, especially for the small and very small countries that now make up the majority in the European Union.

The intrusion of encrypted channels broadcast from large countries into middle-sized or small countries would sound the death knell of encrypted services intended for these countries' populations, and the cultural diversity that these services generate. For example, an encrypted channel in a small country will offer its subscribers programmes like local sporting events or series which the encrypted service originating in a large country will not broadcast (offering instead its own country's sporting events or the series it produces, which will not necessarily be of interest to viewers in the middle-sized or small country).

Broadcasting encrypted services from a large territory to a small territory actually undermines local cultural diversity and creates a media uniformity that goes runs counter to the objective of cultural diversity now introduced by article 2.3 (final sentence) of the European Treaty: *"It [the European Union] shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced"*.

Catering to business or holiday travellers arguably carries little relevance if it is the only reason for offering encrypted services. Apart from the fact that the market concerned (people on the move) is quite small, there is no evidence to suggest that this public is clamouring for the retransmission of services broadcast encrypted in the countries of origin.

Furthermore, calling into question the ability to restrict access to certain television services through programme encryption and conditional access – and even more so just for the needs of business and holiday travellers - would put fundamentally into doubt the territorial management of film and broadcasting rights which is the economic basis of the production and dissemination of this type of content. Clearly, the producers and broadcasters of such content would not like to see any such development (cf Question 1.3 below), as was shown by the work on the stocktaking and revision of the 1993 European "Cable & Satellite" Directive.

These are complex and sensitive issues, and the Commission should consider conducting an in-depth study of the public's needs on a cross-border scale before embarking on a revision of Directive 98/84/EC.

QUESTION 1.2: Do you have any figures or estimates for the size of the cross-border conditional-access market and the grey market?

EUROCINEMA is not competent to answer this question.

Arguably, however, advances in encryption technologies and the regular updating of conditional access systems are apt to restrict the “grey market” to proportions considered acceptable by the operators of the audiovisual services concerned.

QUESTION 1.3: In your opinion, how much of an obstacle do the following represent to the purchase of rights to broadcast events beyond national boundaries:

- *no demand from broadcasters, who do not want to cultivate audiences abroad?*
- *rights holders are reluctant to sell broadcasting rights that go beyond national boundaries, e.g. for a same-language audience spanning more than one country?*
- *lack of access or effective conditional-access broadcasting networks in the other countries?*
- *other fee-based broadcasters refuse to include services aimed at multicultural audiences in their range of conditional-access programmes?*
- *lack of data on the markets created by people moving around the EU to live and work in different countries?*
- *different media laws (pluralism, right to information, cultural promotion, sports promotions, etc)? (give details)*
- *national differences in broadcasting outlets?*
- *other reasons? (give details)*

Film distribution is currently based on distribution territories within which the different broadcasting outlets or “windows” (cinemas, DVD, VOD and pay-per-view, pay TV, free-to-air TV, etc.) allow scrupulous exploitation of rights not only as regards optimizing the receipts that help recoup the cost of works, but more especially - and particularly so when it comes to European works - guarantee the exclusive rights for each “window” and territory granted to the different media in return for their pre-financing of works. The interest of the producer and distributor is therefore to maximise revenue streams by optimising the number of distribution territories and exhibition windows, thus guaranteeing the exclusive – especially territorial – rights granted to each partner or medium involved in pre-financing the work.

It is a well-established fact that in Europe - for films, especially – this distribution takes place progressively, territory by territory, in a kind of patchwork effect which, for big name or heavily-promoted and -marketed films, results in all countries in the Community market being covered.

This requires unremitting efforts from producers, authors, distributors and sales agents: films must always be present at festivals and sales agents permanently and continuously present on film markets if rights are to be sold.

Every film is an example of work placed on the market. Whoever makes the best offering (best actors, best scripts, biggest budgets, most technical resources, biggest promotion and marketing budgets, etc.) is apt to win out in a competitive market. Not every film has the automatic “right” to be distributed and shown, but must win that right by its intrinsic merits in a competitive and selective market (every film is in competition with other examples). It is unsurprising, therefore, that not all of the 600 or more European films can access the exhibition market (just as not all books or music get to market).

It is the territorial exploitation of rights that must therefore be preserved and promoted, although this of course does not preclude licenses being granted by mutual agreement for several territories where deemed relevant (as often happens, for example, with a group of territories within the same language region).

The current methods of cinematographic and audiovisual rights distribution are not obstacles as the Commission would seem to infer, but apposite means of exploiting rights, territory by territory, and window by window. This method of exploitation takes place through contractual agreements between the different parties concerned (producers, distributors, broadcasters), in which the rights sold are exclusive rights.

The Court of Justice of the European Communities has upheld this form of exploitation of rights in relevant judgments. We therefore take issue with the Commission’s use of the word “obstacle” to describe this method of exploitation of rights.

QUESTION 1.4: What do you think could be done to increase the supply of cross-border programmes?

Issue 2 - how effectively is the directive being implemented nationally?

These questions and issues are not in EUROKINEMA's remit

Issue 3 - new services covered by the directive

QUESTION 3.1: Do you know of any cases where the directive's conditional-access rules have been applied to new services, such as video on demand, internet TV (IPTV) or mobile television? If yes, give details.

EUROKINEMA and FERA commissioned a study on the development of video on demand in ten European countries from NPA Conseil (study attached).

The study aimed to collect information on the development of the online distribution of films (the kind of catalogues displayed, rates charged, release timelines, and operator profiles).

The study revealed a major expansion of the online supply of films in recent months, not just by telecoms operators and Internet Service Providers, but also the consumer electronics industry, cultural goods distributors and broadcasters.

The expanding video on demand market is organized on a national basis, where video on line supply is a sub-market fully integrated into the other media (cinemas, Pay TV, DVD, free-to-air TV).

The catalogues of films available through VOD reflect a wide range of supply (US films, national films and sometimes non-national European films). The lack of diversity requirements means that US films already dominate to some extent (from 1/3 to over 80%), with offerings of national contents lying between 4 and 71%, replicating the characteristics of film theatre exhibition which leaves little room for non-national European films (between 5 and 25%).

Where online distribution is concerned, the NPA study done for EUROKINEMA/FERA revealed a major development of VOD sites on a national basis by operators as diverse as telecoms operators, TV distributors and access providers. In this respect, the Commission – whose agenda seems to be a better online distribution of cinematographic works - should carry out a study evaluating the presence of non-national European films on VOD sites.

Arguably, rather than being thrown into question, the patchwork distribution system (in which VOD is gradually finding a place¹) should continue to be strengthened (which the Commission is doing through the Media programme) by providing support to make VOD supply on a territorial basis as open as possible to the supply of non-national European films (and not support for the creation of VOD platforms themselves, which are created by market forces).

QUESTION 3.2: Can the protection offered by the directive be useful for these new services? How?

As can be seen with broadband-based video on demand on PC or TV, as described above in Question 3.1, protection of conditional access and digital rights management systems

¹ Largely dependent on optimising the resources it generates compared to other revenue-stream windows (TV, DVD and cinemas).

(DRMS), which enables rights to be managed on a territorial basis and diversification of the economic models and revenue streams of film making and audio-visual creation, clearly contributes to the development of these new services.

QUESTION 3.3: Do you know of any new types of service other than those mentioned above that might benefit from protection under the directive and which are not, in your opinion, currently covered by it? If yes, give details.

We do not know of any

QUESTION 3.4: Why do internet service providers, telecoms operators and other digital service providers rarely use the protection offered by the directive?

We feel that this analysis requires substantial qualification.

If internet service providers (ISPs) and telecoms operators do not often use the protection offered by the Directive, it is chiefly because they are not necessarily themselves audiovisual communication service providers: they may simply pick up free-to-air programmes to fill out their offerings at least cost in order to attract new subscribers, or they may enter into distribution agreements with existing pay-TV service providers – who will continue to manage their own subscription business – to enhance their average revenue per user (ARPU), or they may combine the two. An example of this is an operator like the French ISP Free (carries a large number of pan-European free-to-air channels, and has sub-distribution agreements with Canal+ and Canalsat).

By contrast, where they do operate such services themselves (such as Orange which has acquired the relevant rights and is now developing its own conditional-access premium content channels), they do use conditional-access systems and so benefit from the protection offered by the Directive.

Issue 4 - has the directive increased copyright protection?

QUESTION 4.1: Is this inability to use the directive a handicap for rights holders, given the other sources of protection available, in particular current copyright laws?

Copyright law (in international law, the WWPT Treaty transposed into Community law, and the Community directives implemented into Member States' national laws) offers reasonable substantive law protection for authors' rights.

By contrast, the implementation and enforcement of intellectual property rights, especially in the digital environment, are marred by serious failings that have resulted in the growth of rampant computer piracy.

In addition to content protection proper via copyright, therefore, sufficient protection must be ensured of the signals which carry that content, without thereby disrupting and calling into question the balance of authors' rights. This is one of the – noteworthy - objectives delivered by the Directive.

Furthermore, in its examination of the revised telecoms package, the Commission introduced two provisions on recognition of intellectual property in the online distribution of copyrighted content.

The first provision, introduced in Annex I (point 19) of the Authorisation Directive (COM (2007) 697 final) emphasises the need for this directive to comply with national measures implementing Directives 2001/29/EC² and 2004/48/EEC³.

The other provision, introduced in article 20.6 of the Universal Service Directive (COM (2007) 698 final) requires electronic communication service and network providers to inform their subscribers, in advance of the conclusion of the contract, about acts of copyright infringement and the legal consequences of such acts.

Since telecoms operators are also content providers and distributors, the Commission's view is that they must inform their customers of their obligations to respect intellectual property.

Our association fully supports these two new provisions, which aim to get telecoms operators to properly inform their customers about the copyright rules governing protected content (music, films, etc.) carried over electronic communications networks.

This is a salutary initiative by the Commission which fully recognizes that, in addition to their key role as infrastructure providers, telecoms operators also hold an absolutely central role in the means of content distribution and access, which includes content protected in law by copyright.

QUESTION 4.2: Given the specific protection offered by copyright law, is there any point in extending the protection offered by the directive to rights holders?

Please refer to the reply to question 4.1

QUESTION 4.3: Should organisers of sports events be able to use the directive directly to prevent piracy concerning the broadcast of the event?

We have no view on this.

One thing to mention here is the lack of protection for pre-broadcast signals due to the failure to revise the WIPO Broadcasting Treaty. Arguably, it is at this level that the issue should be addressed.

Issue 5 - digital rights management (DRM) systems

QUESTION 5.1: How, if at all, can the protection offered by the directive be useful for DRM systems?

QUESTION 5.2: If the protection offered by the directive was recognised as covering DRM, would it be necessary to amend the directive, and how?

We would argue that a conditional access system can be equated to a particular form of DRM, or at the very least a technical protection measure (TPM).

The protection offered by the Directive should follow the lead given by French legislation and rather than calling into question should actually supplement that offered by digital rights management. So, Article L.331-5 of the Intellectual Property Code (on technical protection and information measures) provides that *"the provisions of this chapter shall be without detriment to the legal protection resulting from sections 79-1 to 79-6 and section 95 of Freedom of Communication Act No. 86-1067 of 30 September 1986 [provisions dealing specifically with protection for conditional access systems]"*.

² Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the Information Society.

³ Directive 2004/48/EEC of 29 April 2004 on the enforcement of intellectual property rights.

The same article of the IPC also provides that *“Technological measures must not have the effect of preventing interoperability from being effectively implemented in accordance with copyright”*.

It is worth pointing out here that interoperability of DRMS and of conditional access systems is a major issue both for consumers and for rightholders. Without interoperability, consumers need to be informed of the limits imposed by use control systems⁴ applied by DRMs (digital rights management systems), because digitized content and readers/players are increasingly linked through vertical integration approaches like those of Apple with the iTunes online service (online music and now video service) and iPods (portable digital music and now video players).

Rightholders see interoperability as a means of extending the potential market in the online world. But for all that, it must not detract from their ability to effectively protect their digitized works or be an excuse for circumventing the technical measures implemented to ensure such protection.

The development of interoperable universal systems (recital 54 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the Information Society) must not call into question this protection or the use of DRM tools allowing, for example, territorial exploitation of rights, which is of the essence of the film and audiovisual economy in Europe.

General comment

The broad policy options of extending IPR protection through Directive 98/84 are inexpedient. They run the risk of giving rise to substantive conflicts of laws and exacerbating the lack of transparency and effective protection for rights holders. More preferable would be to stay within the framework of the existing legislation, rights holders' overriding concern being improved protection through better enforcement of intellectual property rights on electronic communication networks.

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| Issue 6 - use of conditional access for purposes other than revenue protection |
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Not relevant to EUROKINEMA

⁴ As is now expressly provided for in French law – the DADVSI (Copyright and Related Rights in the Information Society) Act of 1 August 2006