



## **GSMA-ETNO position paper on the proposed Sat Cab Regulation**

*laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes*

20 February 2018

On 14 September 2016, the European Commission presented its reform proposals on copyright and related rights which form a central pillar of the Commission's Digital Single Market (DSM) policy.

The GSMA and ETNO member companies are active in various areas relating to the production and distribution of (audio-visual) content, ranging from the acquisition of copyrights, related rights and rights protected in a similar manner than the aforementioned, over the provision of respective (TV and video-on-demand) services to the offering of platforms providing consumers' access to such content services. The inclusion of the latter services into convergent consumer products has continuously gained in importance for member companies, especially given the consumers' increasing demand for propositions, which enable access to – preferably any – content anywhere, at any time, over any device.

**The GSMA and ETNO welcome the legislators' endeavour to increase the circulation and availability of works and other protected subject-matter in the Internal Market** in the light of growing demand to access content online and via mobile. The GSMA and ETNO suggest that the **EU legislator should provide for additional instruments in this regard while respecting the balance of interests involved.**

The GSMA and ETNO have identified the **following specific issues** that urgently need to be addressed in the forthcoming trilogue negotiations:

### **Technologically-neutral rights clearance regime for retransmission services<sup>1</sup>**

- The GSMA and ETNO fully support initiatives to foster the availability of radio and TV programmes through extending the retransmission right in a technologically-neutral manner.
- In order to adapt to the development of digital technologies and to the changing user behaviour, the provisions should include all means of retransmission including the Internet to the extent that such services can ensure a controlled environment equivalent to that established by other forms of retransmission, for example where they do have a

---

<sup>1</sup> GSMA's member company British Telecom does not align with this point of the position paper.

definable and addressable subscriber or registered users' group within a Member State's territory.

- In the light of this, we fully support the approach taken by the Council of the EU in its general approach, which should become the blueprint for the final trilogue agreement.

#### **Exploitation of broadcasting programmes through retransmission**

- With regards to the report recently adopted by European Parliament, **the Article 3a will lead to a "double tariff" regulation and is inconsistent with the jurisprudence of the Court of Justice of the European Union.**
- The CJEU denied the right of communication to the public in situations where protected works are not transmitted to a new public. This situation exists always for programs of broadcasting organizations which provide their programs to the public, when they inject their programs to cable retransmission operators. The consequence is a "double tariff" obligation for cable operators which have to pay for the retransmission right and for the right of communication to the public.
- This revision of a CJEU-judgment without any discussion is problematic and particularly unfair where cable operators are subject to the legal "must carry"-obligation. This question is very complex from a legal and economic point of view – also in the light of how this will impact prices for consuming such services in future – and there must be a prior analysis of this issue through an impact assessment by the Commission before considering any legislative steps.
- In the light of this, we strongly argue against the inclusion of art. 3a as proposed by the European Parliament.

#### **Direct Injection of broadcasting programmes' signals**

- "**Direct injection**" – which may be characterized as an act by which *"the distributors (whether cable, IPTV or other) transmit a signal that has not previously been accessible to the public, e.g. is received in an encrypted form via satellite, fiber-optic connection or other means of transmission"* – is increasingly used by broadcasters to contribute signals from a broadcaster's studio or play-out centre directly to a platform operator's master head-end, from where TV and radio programmes are fed into, and distributed to customers in the respective network's technical footprints, e.g. cable networks or satellite platforms. This kind of signal delivery technique mainly serves as a quality-insurance solution (loss-free encoding; redundancy); traditionally, signal reception was exclusively realised through capturing signals distributed via satellite or by terrestrial means, either scrambled/encrypted or not.
- The legal assessment of "direct injection", under copyright law, is **complex** and often depends strongly on (heterogeneous) factual circumstances as well as related arrangements among the parties concerned. The **CJEU** has already **twice** adjudicated in this regard and **elaborated on the issue's most relevant legal aspects**: act of communication, reaching-out to a (new) public, responsibility for providing copyright-

protected works and other protected subject-matter contained in TV programmes to audiences.

- However, considering the above explanation as to where and for what purposes direct injection is in fact being used, the **GSMA and ETNO would question whether it is necessary to introduce regulation on this topic at all**. The criteria established by the CJEU make clear that, for most instances of “direct injection” in the above sense, an unambiguous attribution of responsibility, either to the broadcaster and/or the network/platform operator, should be possible, as long as it is clear that only one act of communication to the public takes place.
- The EU Copyright legal framework should continue referring to a **clear division of responsibilities** along the different mechanisms of rights clearance for the exploitation of works and other protected content, in particular for obtaining the authorization for an act of communication to the public, where necessary.
- In either of the two cases, it will be ensured that the **clearance of rights with different types of holders of copyrights and related rights should follow well- established patterns** and procedures, including the settling of remuneration.
- In any event, it must be ensured that for one and the same act of providing European audiences with TV and radio programmes no additional rights or hindrances to innovative services are being introduced and consequently **no double payments** will take place.

#### **Country-of-origin principle**

- **The GSMA and ETNO do not concur with** the idea of introducing a **country-of-origin approach for broadcasters’ rights clearance** in respect of simulcasting, catch-up and alike services (Art. 1 lit. a), Art. 2, recitals 8 to 10, 15).
- The GSMA and ETNO believe that preserving the territoriality of copyright is pivotal for the sustainability of the audio-visual industry and the preservation of cultural diversity. The proposal to introduce the country-of-origin (CoO) principle for so-called “online ancillary services” offered by broadcasters (i.e. particularly “simulcasting” – services broadcast across more than one medium at the same time – and catch-up functions) would mean that broadcasters can transmit programmes across the EU from the Member State where they are established. This gives rise to concerns about raising sufficient means for financing the production of content, since such an approach significantly limits territorial exclusivity.



#### **About ETNO**

ETNO (the European Telecommunications Network Operators' Association - [www.etno.eu](http://www.etno.eu), @ETNOAssociation) represents Europe's telecommunications network operators and is the principal policy group for European ecommunications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses. ETNO members account for 60% of the total investments in European networks.

Policy contact: Kristina Olausson, Policy Officer, [Olausson\[at\]etno.eu](mailto:Olausson[at]etno.eu)



#### **About the GSMA**

The GSMA represents the interests of mobile operators worldwide, uniting nearly 800 operators with more than 250 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces industry-leading events such as Mobile World Congress, Mobile World Congress Shanghai and the Mobile 360 Series conferences.

Policy contact: Pierantonio Rizzo, Government Affairs Coordinator, [prizzo\[at\]gsma.com](mailto:prizzo[at]gsma.com)