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Re: Information request for GESAC answers to the consultation on Satellite and Cable Directive (SatCab Dir):

Implementation of the satellite provisions of the SatCab Directive and your experiences:

1. Has the "country of origin" principle of the SatCab Dir been helpful to facilitate licensing of works represented by your society across Europe?

   Yes, the licensing of satellite broadcasting that are originating from our country would be extremely cumbersome without the "country of origin" rule of the SatCab Directive. Anyway the STACAB Directive's solution was transposed into HU Copyright law (=CA) in 1999 in a way that mirrors the text of the SatCab Directive.

   a. How were you dealing with licensing of satellite broadcasting prior to the SatCab Dir? What difference did you have after introduction of the directive?

      The HU CMO-s licensed the use occurring in the territory of Hungary. Anyway the first HU originated satellite broadcast was launched after the adoption of the SatCab Directive that was transposed into the HU Copyright law partly as early as 1994 (the free to air satellite broadcasting shall be regarded as if it were terrestrial broadcasting). The licensing occurred within the then existing mandatory collective management system. The CA dated 1999 transposed the SatCab Directive in its entirety.

   b. Based on your licensing experiences, have you had the chance to measure the share (%) of audiences from Member States other than the country of origin in the total audience of satellite broadcasting services?

      Since the HU CMO-s license typically free to air Hungarian satellite broadcasts, it was very easy to estimate the share of HU (=Hungarian speaking) audience in the countries of the footprint of the satellite used by the broadcaster (the satellite used by the broadcaster as well as the footprint is part of the licensing agreement and/or the documentation of the licensing agreement). The number of HU population in other countries is a well-known fact.

   c. Have you encountered any problems in terms of licensing satellite services based on "country of origin" principle?

      No. The HU CMO-s did not encountered any problem with regards to the application of the Satcab Directive.

      i. What were/are those problems (e.g. determining tariffs, mandate to license certain works in other Member States, determining where the communication to public takes place, etc.) and

ii. are they related to any specific type of works (e.g. music, audiovisual, etc.) or
iii. specific type of user (e.g. public service broadcaster, commercial broadcaster, or any other type of user)?

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2. Has the country of origin principle led to a lower level protection? Why?

No, it has not led to any such problem. It has to be added that the HU collective management system is based on extended collective licensing, meaning that it covers all domestic and foreign right holders save for those who opted out from collective management in a way provided for in the CA.

3. Do you still find the satellite provisions of the directive relevant?

Yes. very much, since HU rightholders are of the view that this system should be applied to all auxiliary online uses including broadcasts programs and parts of broadcast programs carried out by broadcasters.

a. Is satellite still an important licensing market (source of revenue) for your operations?

Yes, it plays a certain important role due to the fact that there are also public service satellite broadcasters using mostly HU repertoire and they expect to obtain their broadcasting license locally. Moreover a CMO has to be ready for the case if any commercial satellite broadcaster decides to originate (uplink) its broadcasts from the territory where the CMO operates.

b. Is the legal framework provided by the directive clear and sufficient to address existing satellite services? Please explain.

Yes. It is clear. There are however some program distribution services of encrypted satellite broadcasts, where some further clarification might be needed. Namely it should be clarified that ***if a business (a service provider) other than the original satellite broadcaster offers a program distribution of encrypted satellite broadcasts including the way/method/tool of decryption (direct satellite or direct injection services), it always constitutes an act of communication to the public subject to a separate license.*** *The precondition of the second act is the encrypted origination of the encrypted broadcast programme which may not be regarded as a standalone communication to the public in the country where the program distributor offers its services to the subscribers, since the members of the public could not have access to the programs* ***without the active intervention of the program distributor****. The license obtained by the satellite broadcaster in the country of origination in advance and the license fee paid by the satellite broadcaster to rightholders may never take into consideration the future subscription fees to be paid by the audience to the distributor of the program(s) in another country since neither the number nor the subscription fees nor any other substantial circumstances of the future usage may be known at the time of the conclusion of the initial licensing (please compare with the Airfield decision of the ECJ (C-431/09 and C-432/09, http://curia.europa.eu/juris/document/document.jsf?docid=111226&doclang=EN, that does not cover direct injection services, and does not clarify to a sufficient extent that in practice the originator of the program may never obtain a "full license" in the country of origin).*

4. Has the implementation of the satellite relevant part of the SatCab Dir and the country of origin principle caused you any significant cost? If yes was the cost justified comparing to results of such implementation?

   No. The licensing model of the SatCab is in our view the most effective and cheapest one stop shop way of licensing of multiterritorial broadcast type usages that may offer full title warranty to the commercial users.

Implementation of cable retransmission provisions of SatCab Dir and your experiences:

5. Has the SatCab Dir facilitated wider access to broadcast programmes from other Member States through cable retransmission?

   No. The former mandatory collective management system provided already an appropriate wide access to broadcasts. However, ***the merit of the SatCab Dir is that it guaranteed the maintenance and possible broadening of the existing wide access*** *to the domestic and foreign satellite broadcasts. The now existing mandatory collective management covering all exclusive and remuneration rights save for the broadcasters' rights provides the easiest and most cost-effective way of licensing. This is partly due to the mandatory element and* ***to the statutory one stop shop created by the HU legislator****. As a result the various rightholders' CMO-s do not approach separately the cable operators, there is no need to carry on tiresome, and costly negotiations on the "slicing of the cake", but the HU CA includes the statutory proportions due to the various rightholders unless they agree otherwise. The CMO acting on behalf of all rightholders collects the remuneration and allocates it according to the statutory proportions. As a result the cable operators (in HU there are about 300 small cable operators and a few big market players) can obtain a full license from one source let alone the broadcasters' license.*

   Even some important foreign broadcasters and broadcasters' CMO's entrusted the CMO acting as a one stop shop on behalf of all rightholders being part of the shop to represent them towards the cable operators' associations.

   a. How were you dealing with licensing of cable retransmission services prior to the SatCab Dir? What difference did you have after introduction of the directive?

      Please see our answer to the introductory part of this question.

   b. Have you encountered any problems (legal, administrative, technical, etc.) in implementing cable retransmission provisions of the directive? Please explain.

      No. *Please see our answer to the introductory part of this question.*

6. Do you still find the cable retransmission provisions of the directive relevant?

   a. Is cable retransmission still an important licensing market (source of revenue) for your operations?

      Yes.

   b. Is the legal framework provided by the directive clear and sufficient to address existing (cable) retransmission services? Please explain.

Partly. It is clear only due to the fact that our transposition provision retained the Berne Convention approach and is technology neutral. No matter what kind of platform (technology) is used for the simultaneous unabridged and unchanged transmission, it qualifies as a cable retransmission. It helps to license IP TV/online platform services that correspond to the broad term of the cable retransmission.

There are some new services that arises questions. Eg. the so called OTT (=over the top) services provide online access to programs retransmitted via cable on various web enabled devices. The problem is that this is still the retransmission of the same program, no other repertoire is used, and the cable license is granted with regards to the number of households. In other words it is not limited according to the number of persons living in that household or according to the number of TV sets. The OTT service broadens the scope of the service with the portability and the number of the devices used for the reception of the OTT service, but this phenomenon cannot be properly treated if a CMO wishes to set the tariff as close to the potential number of audience as possible. (If a CMO licenses cable retransmission on a proportion of the revenue basis this problem does not arises.). The other local problem has arisen with regards to the SD/HD feed. From the aspect of the rightholders represented by the CMO-s a simulcast of the SD feed of HD broadcasts carried out for the sake of that part of the audience that does not own a HD enabled TV set does not constitute a new usage. The problem arises in connection with the seeking of HD licenses from the broadcasters that should also include the transformation of the signals into SD format. The broadcasters refer to the "ownership" of the programme carrying signals and do not give consent to the technical transformation that does not affect the content of the program.

c. Has the cable retransmission legal framework been extended to cover similar services operating on/through internet in your country? What type of services were covered?

Yes, please see our previous answer.

7. Have you ever used the negotiation and mediation mechanisms established under the Directive?

No. The CA provides for a government (HIPO) approval system of tariffs. It includes a certain mediation phase, namely substantial users and users' associations have a right to opine on the draft tariffs submitted for approval. If there are diverging opinions HIPO organizes informal conferences to settle the eventual dispute (without having a formal mediation). The mediation has never been invoked.

a. Are there any rules on this in your national law? Are there any other arrangements?

There are rules to implement the mediation rules of the SatCab. A body is formed attached to HIPO to adjudicate disputes between CMO-s and affected users. The procedure is a mixture of mediation and arbitration but no binding resolution may be passed. The body may promote an agreement of the parties and such agreement can be accepted.

Egyeztető testület *102. § Ha a felhasználó és a jogosult között, vagy a felhasználók vagy érdekképviseleti szervezetük és a jogosultak közös jogkezelő egyesülete között nem jön létre megállapodás a*	*Mediation Board* *Article 102* *If no agreement on remuneration and other terms and conditions of use is reached between the user and the rightholder, or between the users or their representative organisation and the*

díjazásról és a felhasználás egyéb feltételeiről, bármelyik fél a 103. § alapján létrehozott egyeztető testülethez fordulhat.	*collecting society of the rightholders, either party may turn to the Mediation Board set up pursuant to Article 103.*
(…)	*(…)*
104. § (1) Az egyeztető testület eljárásának célja, hogy a felek közötti megállapodás létrehozását elősegítse. A közös jogkezeléssel kapcsolatos vitában kezdeményezett egyeztető testületi eljárásról a testület haladéktalanul tájékoztatja az igazságügyért felelős minisztert, a kultúráért felelős minisztert és a Hivatalt.	*Article 104* *(1) The objective of the procedure of the Mediation Board is to facilitate the conclusion of an agreement between the parties. In the case of a procedure initiated in a dispute concerning collective management of rights, the Mediation Board shall fortwith inform the Minister responsible for justice, the Minister responsible for culture and the Office.*
(2) ***Ha a felek között nem jön létre megállapodás, az egyeztető testület javaslatot készít a megállapodás tartalmára, amelyet a felekkel írásban közöl.***	***(2) If no agreement is reached between the parties, the Mediation Board shall draft a proposal concerning the content of the agreement which it communicates to the parties in writing.***
(3) A javasolt megállapodást a felek kifejezetten vagy hallgatólagosan elfogadhatják. Hallgatólagos elfogadásnak kell tekinteni, ha a megállapodási javaslatot a fél a kézbesítéstől számított három hónapon belül nem kifogásolja az egyeztető testületnél.	***(3) The parties may accept the agreement expressly or tacitly. It shall be regarded as a tacit acceptance if no objection is made by the parties to the Mediation Board with regard to the proposal for agreement within three months from the date of its delivery.***
(4) Ha az egyeztető testület a 105. §-ban foglalt szabályok megsértésével járt el, a sérelmet szenvedett fél az egyeztető testület döntése alapján létrejött megállapodást az annak hatálybalépésétől számított három hónapon belül bíróság előtt megtámadhatja.	*(4) If the Mediation Board has proceeded by infringing the provisions of Article 105, the party having sustained injury may bring an action before the court against the agreement established by the decision of the Mediation Board within three months from its entry into force.*
(5) A (4) bekezdésben említett eljárás a Fővárosi Törvényszék hatáskörébe és kizárólagos illetékessége alá tartozik.	*(5) In the procedure referred to in Paragraph (4), the Metropolitan Court shall have jurisdiction and exclusive competence.*
105. § (1) Az egyeztető testület eljárása során a feleket egyenlő elbánásban kell részesíteni, és mindegyik félnek meg kell adni a lehetőséget, hogy álláspontját előadhassa. Az egyeztető testület a feleket az eljárásban való részvételre, eljárási cselekmények lefolytatására nem kötelezheti, kivéve, ha a felek ebben megállapodnak. Egyebekben az egyeztető testület - a (2) bekezdésben említett szabályzat keretein belül - az eljárási	*Article 105* *(1) Equal treatment shall be given to the parties during the proceedings of the Mediation Board and either party shall have the possibility to present his position. The Mediation Board may not oblige the parties to participate in the proceedings and carry out acts of proceedings unless the parties have agreed thereto. As regards other matters, the Mediation Board shall itself establish its rules of proceedings – within the*

szabályait, valamint a díjszabását maga állapítja meg. (…)	*frameworks of the statutes referred to in Paragraph (2) – and determine its tariffs. (…)*

In addition please see the answer to the introductory part of Q 7.

b. Were those mechanisms useful?

The Mediation Board has never been used.

8. Has the implementation of the cable retransmission relevant part of the SatCab caused you any significant cost? If yes, was the cost justified comparing to results of such implementation?

No. It rendered possible to use the most cost-effective way of licensing that is based on a framework agreement concluded with the nationwide associations of cable operators.

9. How do you license the rights relevant for the transmission of broadcasters' services via direct injection in cable network?

We dealt with this problem under 3.b) since the direct injection (= direct satellite services from a legal aspect) does not correspond to the term of cable retransmission, which is a secondary communication to the public that may only occur with regards to free to air broadcasts as the primary communication to the public. "The direct injection" is an issue of the interpretation of the primary communication to the public, since the encrypted origination of satellite broadcasts does not per se constitute a communication to the public, it may not reach the audience without the intervention of the second player (the program distributor).

10. Based on your national experience and given the difference in the geographical reach of distribution of programmes over the internet (i.e. not limited by geographical boundaries) in comparison to cable (limited nationally), should any extension be limited to "closed environments" (e.g. IPTV) or also cover open simultaneous retransmissions and/or transmissions (simulcasting) over the internet?

Please see our answer to Q 6.b.

Please add any other significant national experiences (problem, need for clarification, best, practice, etc.) that you think would be relevant in this respect

2015. október 30.

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