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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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

(Text with EEA relevance)

{SWD(2016) 301}
{SWD(2016) 302}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Digital technologies facilitate the distribution of and access to works and other protected subject matter, with 49% of European internet users accessing music, audiovisual content and games online.[1] Broadcasters and retransmission service providers are increasingly investing in the development of digital and online services for the distribution of radio and television programmes. The online offerings of broadcasters include notably simulcasting services (TV/radio channels which are transmitted online alongside traditional broadcasting by satellite, cable or, terrestrial), TV catch-up services[2] and podcasts. Despite the growing variety of online services, broadcasters' programmes often remain unavailable online to European citizens living in other Member States. In addition, the variety of TV and radio channels from other Member States provided by retransmission services differs across the EU.

Broadcasting organisations transmit on a daily basis a high number of news, cultural, political, documentary or entertainment programmes that they license from others or produce themselves. These programmes incorporate a variety of protected content such as audiovisual, musical, literary or graphic works. This requires a complex clearance of rights with a multitude of right holders. Often, the rights need to be cleared in a short time-frame, in particular when preparing programmes such as news or current affairs. In order to make their services available across borders, broadcasting organisations need to have the required rights for the relevant territories and this increases the complexity of the rights' clearance. For satellite broadcasting the clearance of rights has been facilitated by the application of the country of origin principle enshrined in the Satellite and Cable Directive (Directive 93/83/EEC), allowing broadcasters to clear the rights only in one Member State. That Directive does not apply when a broadcaster clears rights for its online services.

Operators of retransmission services, which aggregate a high number of TV and radio channels into packages, also face difficulties for acquiring all the rights necessary to retransmit the television and radio programmes of broadcasting organisations. The Satellite and Cable Directive provides for a system of mandatory collective management for retransmissions by cable of TV and radio broadcasts from other Member States. This system, facilitating the clearance of rights, does not extend to retransmission services provided by means other than cable over closed electronic communication networks, such as IPTV (TV/radio over closed circuit IP-based networks). Operators of such retransmission services therefore face a heavy rights clearing burden in order to be able to provide their services, in particular when they retransmit TV and radio broadcasts from other Member States.

This proposal aims to promote the cross-border provision of online services ancillary to broadcasts and to facilitate digital retransmissions over closed networks of TV and radio programmes originating in other Member States by adapting the Union legal framework. By addressing the difficulties related to the clearance of rights, it creates the conditions allowing broadcasters and operators of retransmission services to offer wider access to TV and radio programmes across the EU. As a result, this proposal will promote consumers' access to more TV and radio programmes originating in other Member States, both as concerns ancillary online services of broadcasting organisations and retransmission services. The proposal

[1] Source: Eurostat, 'Community survey on ICT usage in households and by individuals', 2014.

[2] The concept of 'catch-up' television, enabling consumers to view programmes at the own choice of timing, is generally based on clearance of the rights for programming within a limited window, typically 7 to 30 days after transmission.

introduces a common approach in the Union while maintaining a high level of protection for right holders. In doing so, it contributes to the functioning of the internal market as an area without internal borders.

- **Consistency with existing provisions in the policy area**

The Digital Single Market Strategy[3] puts forward a range of initiatives in order to create an internal market for digital content and services. In December 2015, a first step was undertaken by the Commission with the proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market[4].

This proposal responds to one of the key objectives identified in the Digital Single Market Strategy: to enhance wider online access to TV and radio programmes by users across the EU. Promoting the cross-border provision of online services ancillary to broadcasts and facilitating digital retransmissions of TV and radio programmes originating in other Member States is a significant step that addresses a specific obstacle to cross-border access to broadcast content for the benefit of users.

This proposal is consistent with the legal instruments in the domain of copyright, in particular Directive 93/83/EEC, Directive 2001/29/EC, Directive 2006/115/EC and Directive 2014/26/EU. Those Directives, as well as this proposal, contribute to the functioning of the internal market, ensure a high level of protection for right holders and facilitate the clearance of rights.

This proposal also contributes to the improvement of the cross-border reach of audiovisual media services and hence complements Directive 2010/13/EU[5].

- **Consistency with other Union policies**

According to Article 167 of the Treaty on the Functioning of the European Union (TFEU), the Union shall take cultural aspects into account in its action under the Treaties. By facilitating access to TV and radio programmes, this proposal would enhance access to cultural content, news and information.

This proposal contributes to promoting the interests of consumers by promoting more access to TV and radio programmes from other Member States and thus is consistent with the EU policies in the field of consumer protection and Article 169 TFEU.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The proposal for a Regulation is based on Article 114 TFEU. This Article confers on the EU the power to adopt measures which have as their object the establishment and functioning of the internal market. This includes the freedom to provide and to receive services.

The EU has harmonised the rights which are relevant for the online dissemination of works and other protected subject matter as well as for the retransmission of TV and radio programmes (notably the rights of reproduction, communication to the public and making available) in Directive 2001/29.

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3 COM(2015) 192 final.
4 COM(2015) 627 final.
5 OJ L 95, 15.4.2010, p. 1–24.

The present proposal for a Regulation concerns the facilitation of the clearance of rights for ancillary online services by broadcasting organisations by introducing a principle of country of origin, according to which the copyright relevant act takes place solely in the Member State where the broadcasting organisation is established. It also facilitates the clearance of rights for retransmission services provided over closed networks (other than cable), by introducing rules on mandatory collective management. The aim of the proposal is to take account of, inter alia, the changes in technology which necessitate adaptation of the previously harmonised legal framework.

The proposed instrument is a regulation given the need to ensure that the rules achieve the objective in a uniform manner and are directly applicable.

- **Subsidiarity (for non-exclusive competence)**

The issue addressed by this proposal, namely wider access to TV and radio programmes by citizens across the Union, is in essence of a cross-border nature. Only a Union instrument can establish a rule that applies the principle of the country of origin to cross-border transmissions of TV and radio programmes. Concerning the exercise of retransmission rights, only a Union instrument can remove the existing market fragmentation in the way rights are managed for digital retransmission services and thereby ensure legal certainty to retransmission operators. Nevertheless, certain specific provisions concerning the application of mandatory collective management to retransmission services provided over closed networks should be determined by Member States.

- **Proportionality**

The proposal establishes enabling mechanisms in order to facilitate the clearance of copyright and related rights in relation to certain types of online transmissions and retransmissions over closed networks of TV and radio programmes. It is targeted and covers only specific segments of the market (ancillary online services of broadcasters and certain retransmission services provided by means of IPTV and other "closed" electronic communications networks) while other services (e.g. on-demand services not linked to a broadcast) are outside its scope. In addition, the proposal does not oblige broadcasting organisations to provide their online ancillary services across borders, nor does it oblige operators of retransmission services to offer programmes from other Member States. The proposal does not prevent either the exercise of the contractual freedom of the parties to limit the exploitation of the rights affected by the principle of country of origin done in compliance with Union law.

Concerning the country of origin rule applicable for clearing rights for the broadcasters' ancillary online services, it only localises the relevant copyright acts for the purposes of exercising the rights (e.g. obtaining a licence). Therefore, the country of origin does not affect the localisation of the relevant copyright acts when rights have not been cleared (i.e. in the case of unauthorised transmissions).

As concerns the retransmission rights, the proposal only affects the exercise of the retransmission rights while leaving these rights intact. Moreover, the proposal covers retransmissions insofar as they concern TV and radio programmes originating in other Member States.

- **Choice of the instrument**

A regulation is directly applicable in Member States and therefore this instrument guarantees a uniform application of the rules across the Union and their entering into force at the same time. This would allow ensuring full legal certainty to service providers operating in different territories. The direct applicability of the provisions of this proposal would prevent legal

fragmentation and provide a harmonised set of rules to facilitate the cross border provision of TV and radio programmes online and of the retransmission services.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

The Commission carried out an evaluation of Directive 93/83/EEC[6] and in particular of the effectiveness and relevance of the principle of the country of origin as it applies to satellite transmissions and of the rules on mandatory collective management for cable retransmissions. The evaluation showed that these mechanisms have facilitated the clearance of copyright and related rights for cross-border satellite broadcasts and for the simultaneous retransmissions by cable of broadcasts from other Member States. It however pointed out that Directive 93/83/EEC - due to the technology-specific nature of its provisions - does not apply to the new digital technologies used for transmission and retransmission of TV and radio programmes that have emerged in recent years.

- **Stakeholder consultations**

A public consultation on the review of Directive 93/83/EEC was conducted from 24 August to 16 November 2015.[7] It invited respondents to give feedback on the functioning of the rules related to the clearance of rights for satellite broadcasters and cable operators and to assess the possible need to extend these rules to online transmissions and to retransmissions by other means than cable. In addition, the Commission had extensive discussions with stakeholders (public and commercial broadcasters, telecommunications operators, right holders and collective management organisations (CMOs)) in 2015-2016 to discuss issues related to online transmissions and retransmissions of TV and radio programmes.

Consumers are generally in favour of a broad extension of the country of origin principle to cover all online services, even if some of them consider that this mechanism may not be sufficient to ensure cross-border access. All public service broadcasters as well as commercial radios call for the application of the country of origin principle to broadcast-related online services. By contrast, commercial broadcasters, right holders and CMOs express strong reservations on extending the application of the country of origin principle. They consider that any such extension would restrict their ability to license rights on a territorial basis.

Consumers, cable and telecommunication operators, public service broadcasters and the vast majority of CMOs are in favour of a possible extension of mandatory collective management to the simultaneous retransmissions of TV and radio programmes on platforms other than cable. Many CMOs and public service broadcasters as well as some cable and telecommunication operators insist that the extension should be limited to "closed environments" which function in a manner comparable to cable. Most right holders are against a possible extension of the mandatory collective management regime due to the potential disruptive effect on the markets. Commercial broadcasters also tend to oppose it.

The measures foreseen in this proposal take into account a number of concerns signaled by stakeholders, notably as regards the scope of extension of the principle of the country of origin (e.g. broadcasters' video-on-demand services are outside the scope and the intervention

[6] See Ex-post (REFIT) Evaluation of the Satellite and Cable Directive (93/83/EEC)

[7] See Synopsis Report on the Responses to the Public Consultation on the Review of the Satellite and Cable Directive https://ec.europa.eu/digital-single-market/en/news/full-report-public-consultation-review-eu-satellite-and-cable-directive

only relates to the clearance of rights that are necessary for the ancillary online services) and of the mechanism of mandatory collective management of rights (which is limited to closed networks).

- **Collection and use of expertise**

Legal[8] and economic[9] studies have been conducted on the application of EU copyright rules to the digital environment (in particular with regard to online transmissions and retransmissions in digital networks). In addition, a study has been carried out in 2015/2016 to support the evaluation of the Satellite and Cable Directive and the assessment of its possible extension.[10]

- **Impact assessment**

An impact assessment was carried out for this proposal.[11] On 22 July 2016, the Regulatory Scrutiny Board gave a positive opinion on the understanding that the impact assessment will be further improved.[12] The final Impact Assessment takes on board the comments contained in that opinion.

The impact assessment examines two sets of policy options, aimed at facilitating the clearance of rights (i) for the online transmissions of TV and radio programmes; and (ii) for digital retransmissions of TV and radio programmes.

As regards online transmissions of TV and radio programmes, three policy options were examined further to the baseline option. A non-legislative option (Option 1), consisting in promoting voluntary agreements to facilitate the clearing of rights for certain broadcasters' online services, was not retained as its outcome would be uncertain, depending on the stakeholders' willingness to license rights, and would not ensure a homogenous licensing regime. The application of the country of origin principle to online transmissions was examined through two legislative options: under Option 2, the scope of application was limited to broadcasters' online services which are ancillary to the initial broadcasts (notably simulcasting and catch-up services); under Option 3 the application was extended to online transmissions which are not linked to a broadcast (webcasting services). Option 2 would significantly reduce the transaction costs faced by broadcasters willing to make their transmissions available online and across borders. Option 3 would in principle extend these benefits to webcasters; however, considering that the webcasting market is still at a development stage and that online operators may easily relocate their establishment in the EU, it would also generate legal uncertainty for right holders and could lead to a lowering of the level of protection. Option 3 was therefore rejected. The application of the country of origin principle only to certain well-identified online services of broadcasters (Option 2) was considered more appropriate. By reducing the transaction costs related to cross-border transmissions, this option will open new opportunities for broadcasters to offer their online

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8 Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (see in particular the part on "retransmission of copyright-protected content in digital networks"): http://ec.europa.eu/internal_market/copyright/studies/index_en.htm;
Study on the making available right and its relationship with the reproduction right in cross-border digital transmissions: http://ec.europa.eu/internal_market/copyright/docs/studies/141219-study_en.pdf

9 Economic Analysis of the Territoriality of the Making Available Right in the EU: http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study1_en.pdf

10 Survey and data gathering to support the evaluation of the Satellite and Cable Directive 93/83/EEC and assessment of its possible extension, 2016 [Add reference when published].

11 Add link to IA and Executive Summary

12 Add link to RSB opinion

services across borders, in particular as concerns content which does not rely on territorial exclusivity. This option does not restrict right holders and broadcasters' possibility to continue licensing rights on a territorial basis, subject to the requirements of EU and national law.

As regards digital retransmissions of TV and radio programmes, two policy options were considered in addition to the baseline option. Under Option 1, the scope of application of mandatory collective management of rights was limited to IPTV retransmission services and other retransmission services provided over "closed" electronic communications networks, while under Option 2 it would also cover over-the-top retransmission services, as long as they are provided to a defined number of users. Although Option 2 would allow a wider range of retransmission services to benefit from reduced transaction costs for the clearance of rights, it would also entail risks of undermining right holders' exclusive online rights and distribution strategies, leading to a reduction of licensing revenues. Option 1 did not present such a risk, as most of the retransmission services provided over "closed" electronic communications networks rely on the established infrastructures located in a particular territory. Option 1 was chosen as the preferred option. It is expected to increase consumer choice in terms of retransmission services of TV and radio broadcasts from other Member States.

The proposal is expected to yield positive results in terms of benefits versus costs. Transaction costs associated with the clearance of rights should decrease, fostering better choice to consumers without disruptive effects on right holders. Furthermore, the proposal could generate new licensing opportunities for right holders and additional licensing revenues.

- **Regulatory fitness and simplification**

The proposal will reduce the transaction costs faced by TV and radio broadcasters as well as retransmission service providers and would therefore be positive for SMEs active in this area. It is also expected to be beneficial to right holders, in particular individual right holders, micro-companies and SMEs that do not have the capacity to manage individual licensing deals with a high number of service providers in different territories. Therefore, exemptions of micro-companies or mitigating measures in favor of SMEs have not been deemed necessary.

New technological developments have been carefully examined and taken into account in this proposal, which focuses on online transmissions and digital retransmissions of TV and radio programmes. Certain types of online transmission and retransmission services have been excluded from the scope of this proposal, mainly on the basis of the uncertainty linked to ongoing market developments and the nascent nature of certain services.

- **Fundamental rights**

By establishing the licensing regimes applicable to certain types of cross-border online transmissions and retransmissions over closed networks, the proposal will have a limited impact on copyright as a property right and on the freedom to conduct a business, protected under Articles 17 and 16 of the Charter of Fundamental Rights of the European Union. At the same time, the proposal will have a beneficial impact on the freedom of expression and information, protected under Article 11 of the Charter, as it will increase the cross-border provision and receipt of TV and radio programmes which originate in other Member States.

4. BUDGETARY IMPLICATIONS

The proposal has no impact on the European Union budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The first data collection should take place when the Regulation enters into force in order to establish the baseline for future evaluations. The monitoring process would then focus on progress made in relation to the cross-border availability of TV and radio programmes, with data collection taking place every two to three years.

Pursuant to Article 6 of the proposal, the Commission will carry out a review of the Regulation and will present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee. That report will include an assessment of the effects of the Regulation on the cross-border accessibility of ancillary online services. The review shall be conducted according to the Commission's Better Regulation Guidelines.

- **Detailed explanation of the specific provisions of the proposal**

Article 1 defines the services covered by the measures (notably "ancillary online services" and "retransmission" services). These definitions will be applied in a uniform manner in the Union.

Article 2 establishes that the copyright acts relevant for the provision of an ancillary online service occur solely in the Member State where the broadcasting organisation is established. The notion of the "principal establishment" of a broadcasting organisation would be in accordance with Union law.

Articles 3 and 4 regulate the exercise of the right of retransmission covered by the proposal. They lay down rules that are similar to those laid down in Articles 9 and 10 of Directive 93/83/EC concerning cable retransmissions. Article 3 leaves certain discretion to Member States as in the case of cable retransmission under Directive 93/83/EC. Articles 3 and 4 include provisions on mandatory collective management of copyright and related rights relevant for retransmission, on legal presumptions of representation by collective management organisations and on the exercise of the cable retransmission right by broadcasting organisations.

Article 5 sets out transitional provisions.

Article 6 provides that the Commission shall carry out a review of the Regulation and present a report on its main findings. It obliges Member States to provide the Commission with necessary information for the preparation of that report.

Article 7 sets out the final provisions, namely the date of entry into force of the Regulation and the date from which the Regulation shall apply.

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Proposal for a

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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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[13],

Having regard to the opinion of the Committee of the Regions[14],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) In order to contribute to the functioning of the internal market, it is necessary to provide for wider dissemination of television and radio programmes originating in other Member States for the benefit of users across the Union by facilitating licensing of copyright and related rights in works and other protected subject-matter contained in broadcasts of such programmes. Indeed, television and radio programmes are important means of promoting cultural and linguistic diversity, social cohesion and access to information.

(2) The development of digital technologies and internet has transformed the distribution of and access to television and radio programmes. Users increasingly expect to have access to television and radio programmes both live and on-demand, using traditional channels such as satellite or cable and also through online services. Broadcasting organisations are therefore increasingly offering, in addition to their own broadcasts of television and radio programmes, online services ancillary to their broadcast, such as simulcasting and catch-up services. Retransmission services operators, which aggregate broadcasts of television and radio programmes into packages and provide them to users simultaneously to the initial transmission of the broadcast, unaltered and unabridged, use various techniques of retransmission such as cable, satellite, digital terrestrial, closed circuit IP-based or mobile networks as well as the open internet. On the part of users, there is a growing demand for access to broadcasts of television and radio programmes not only originating in their Member State but also in other Member States of the Union, including from members of linguistic minorities of the

[13] OJ C […], […], p. […].
[14] OJ C […], […], p. […].

Union as well as from persons who live in another Member State than their Member State of origin.

(3) A number of barriers hinder the provision of online services which are ancillary to broadcasts and the provision of retransmission services and thereby the free circulation of television and radio programmes within the Union. Broadcasting organisations transmit daily many hours of news, cultural, political, documentary or entertainment programmes. These programmes incorporate a variety of content such as audiovisual, musical, literary or graphic works, which is protected by copyright and/or related rights under Union law. That results in a complex process to clear rights from a multitude of right holders and for different categories of works and other protected subject matter. Often the rights need to be cleared in a short time-frame, in particular when preparing programmes such as news or current affairs. In order to make their online services available across borders, broadcasting organisations need to have the required rights to works and other protected subject matter for all the relevant territories which further increases the complexity of the rights' clearance.

(4) Operators of retransmission services, that normally offer multiple programmes which use a multitude of works and other protected subject matter included in the retransmitted television and radio programmes, have a very short time-frame for obtaining the necessary licences and hence also face a significant rights clearing burden. There is also a risk for right holders of having their works and other protected subject matter exploited without authorisation or payment of remuneration.

(5) The rights in works and other protected subject matter are harmonised, among others, through Directive 2001/29/EC of the European Parliament and of the Council[15] and Directive 2006/115/EC of the European Parliament and of the Council.[16]

(6) Council Directive 93/83/EEC[17] facilitates cross-border satellite broadcasting and retransmission by cable of television and radio programmes from other Member States of the Union. However, the provisions of that Directive on transmissions of broadcasting organisations are limited to satellite transmissions and therefore do not apply to online services ancillary to broadcast while the provisions concerning retransmissions of television and radio programmes from other Member States are limited to simultaneous, unaltered and unabridged retransmission by cable or microwave systems and do not extend to such retransmissions by means of other technologies.

(7) Therefore, cross-border provision of online services ancillary to broadcast and retransmissions of television and radio programmes originating in other Member States should be facilitated by adapting the legal framework on the exercise of copyright and related rights relevant for those activities.

(8) The ancillary online services covered by this Regulation are those services offered by broadcasting organisations which have a clear and subordinate relationship to the

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15 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001, p. 10–19.

16 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property OJ L 376, 27.12.2006, p. 28–35.

17 Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission OJ L 248, 6.10.1993, p. 15–21.

broadcast. They include services giving access to television and radio programmes in a linear manner simultaneously to the broadcast and services giving access, within a defined time period after the broadcast, to television and radio programmes which have been previously broadcast by the broadcasting organisation (so-called catch-up services). In addition, ancillary online services include services which give access to material which enriches or otherwise expands television and radio programmes broadcast by the broadcasting organisation, including by way of previewing, extending, supplementing or reviewing the relevant programme's content. The provision of access to individual works or other protected subject matter that have been incorporated in a television or radio programme should not be regarded as an ancillary online service. Similarly, the provision of access to works or other protected subject matter independently of broadcast, such as services giving access to individual musical or audiovisual works, music albums or videos, do not fall under the definition of ancillary online service.

(9) In order to facilitate the clearance of rights for the provision of ancillary online services across borders it is necessary to provide for the establishment of the country of origin principle as regards the exercise of copyright and related rights relevant for acts occurring in the course of the provision of, the access to or the use of an ancillary online service. That principle of country of origin should apply exclusively to the relationship between right holders (or entities representing right holders such as collective management organisations) and broadcasting organisations and solely for the purpose of the provision of, the access to or the use of an ancillary online service. The principle of country of origin should not apply to any subsequent communication to the public or reproduction of content which is protected by copyright or related rights and which is contained in the ancillary online service.

(10) Since the provision of, the access to or the use of an ancillary online service is deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment, while de facto the ancillary online service can be provided across borders to other Member States, it is necessary to ensure that in arriving at the amount of the payment to be made for the rights in question, the parties should take into account all aspects of the ancillary online service such as the features of the service, the audience, including the audience in the Member State in which the broadcasting organisation has its principal establishment and in other Member States in which the ancillary online service is accessed and used, and the language version.

(11) Through the principle of contractual freedom it will be possible to continue limiting the exploitation of the rights affected by the principle of country of origin laid down in this Regulation, especially as far as certain technical means of transmission or certain language versions are concerned, provided that any such limitations of the exploitation of those rights are in compliance with Union law.

(12) Operators of retransmission services offered on satellite, digital terrestrial, closed circuit IP-based, mobile and similar networks, provide services which are equivalent to those provided by operators of cable retransmission services when they retransmit simultaneously, in an unaltered and unabridged manner, for reception by the public, an initial transmission from another Member State of television or radio programmes, where this initial transmission is by wire or over the air, including by satellite but excluding online transmissions, and intended for reception by the public. They should therefore be within the scope of this Regulation and benefit from the mechanism introducing mandatory collective management of rights. Retransmission services which are offered on the open internet should be excluded from the scope of this

Regulation as those services have different characteristics. They are not linked to any particular infrastructure and their ability to ensure a controlled environment is limited when compared for example to cable or closed circuit IP-based networks.

(13) In order to provide legal certainty to operators of retransmission services offered on satellite, digital terrestrial, closed circuit IP-based, mobile or similar networks, and to overcome disparities in national law regarding such retransmission services, rules similar to those that apply to cable retransmission as defined in Directive 93/83/EEC should apply. The rules established in that Directive include the obligation to exercise the right to grant or refuse authorisation to an operator of a retransmission service through a collective management organisation. This is without prejudice to Directive 2014/26/EU[18] and in particular to its provisions concerning rights of right holders with regard to the choice of a collective management organisation.

(14) Any rights held by broadcasting organisations themselves in respect of their broadcasts, including rights in the content of the programmes, should be exempted from the mandatory collective management of rights applicable for retransmissions. Operators of retransmission services and broadcasting organisations generally have ongoing commercial relations and as a result the identity of broadcasting organisations is known to operators of retransmission services and hence the clearance of rights with broadcasting organisations is comparatively simple. Thus, to obtain the necessary licences from broadcasting organisations, operators of retransmission services do not face the same burden as they face to obtain licences from holders of rights in works and other protected subject matter included in the retransmitted television and radio programmes. Therefore, there is no need for the simplification of the licensing process with regard to rights held by broadcasting organisations.

(15) In order to prevent circumvention of the application of the country of origin principle through the extension of the duration of existing agreements concerning the exercise of copyright and related rights relevant for the provision of an ancillary online service as well as the access to or the use of an ancillary online service, it is necessary to apply the principle of country of origin also to existing agreements but with a transitional period.

(16) This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. Whilst there may be an interference with the exercise of the rights of right holders insofar as mandatory collective management is required for the exercise of the right of communication to the public with regard to retransmission services, it is necessary to prescribe such a condition in a targeted manner for specific services and in order to allow more widespread cross-border dissemination of television and radio programmes by facilitating the clearance of these rights.

(17) In order to achieve the objective of promoting the cross-border provision of ancillary online services and of facilitating retransmissions of television and radio programmes originating in other Member States, it is appropriate to adopt a Regulation, which directly applies in Member States. A Regulation is necessary in order to guarantee a uniform application of the rules across Member States and their entering into force at the same time with regard to all the concerned transmissions and retransmissions. The direct applicability of a Regulation reduces legal fragmentation and provides greater

[18] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, p. 72–98.

uniformity by introducing a harmonised set of rules which promote the free circulation of television and radio programmes originating in other Member States.

(18) A review of the Regulation should be undertaken after the Regulation has been in force for a period of time, in order to assess, among others, to what extent the cross-border provision of ancillary online services has increased to the benefit of European consumers and hence also to the benefit of improved cultural diversity in the Union.

(19) Since the objective of this Regulation, namely promoting the cross-border provision of ancillary online services and facilitating retransmissions of television and radio programmes originating in other Member States, cannot be sufficiently achieved by Member States and can therefore, by reason of the scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve its objective. As concerns the cross-border provision of ancillary online services, this Regulation establishes enabling mechanisms to facilitate the clearance of copyright and related rights. This Regulation does not oblige broadcasting organisations to provide such services across borders. Neither does this Regulation oblige operators of retransmission services to include in their services television or radio programmes originating in other Member States. This Regulation concerns only the exercise of certain retransmission rights to the extent necessary to simplify the licensing of copyright and related rights for such services and only with regard to television and radio programmes originating in other Member States of the Union,

HAVE ADOPTED THIS REGULATION:

Article 1
Definitions

For the purpose of this Regulation, the following definitions shall apply:

(a) "ancillary online service" means an online service consisting in the provision to the public, by or under the control and responsibility of a broadcasting organisation, of radio or television programmes simultaneously with or for a defined period of time after their broadcast by the broadcasting organisation as well as of any material produced by or for the broadcasting organisation which is ancillary to such broadcast;

(b) "retransmission" means any simultaneous, unaltered and unabridged retransmission, other than cable retransmission as defined in Directive 93/83/EEC and other than retransmission provided over an internet access service as defined in Regulation (EU) 2015/2120 of the European Parliament and of the Council[19], intended for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite but excluding online transmission, of television or radio programmes intended for the reception by the public, provided that such retransmission is made by a party other than the broadcasting organisation

[19] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, OJ L 310, 26.11.2015, p. 1.

which made the initial transmission or under whose control and responsibility such transmission was made.

Article 2

Application of the principle of 'country of origin' to ancillary online services

(1) The acts of communication to the public and of making available occurring when providing an ancillary online service by or under the control and responsibility of a broadcasting organisation as well as the acts of reproduction which are necessary for the provision of, the access to or the use of the ancillary online service shall, for the purposes of exercising copyright and related rights relevant for these acts, be deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment.

(2) When fixing the amount of the payment to be made for the rights subject to the country of origin principle as set out in paragraph 1, the parties shall take into account all aspects of the ancillary online service such as the features of the ancillary online service, the audience, and the language version.

Article 3

Exercise of the rights in retransmission by right holders other than broadcasting organisations

(1) Holders of copyright and related rights other than broadcasting organisations may exercise their rights to grant or refuse the authorisation for a retransmission only through a collective management organisation.

(2) Where a right holder has not transferred the management of the right referred to in paragraph 1 to a collective management organisation, the collective management organisation which manages rights of the same category for the territory of the Member State for which the operator of the retransmission service seeks to clear rights for a retransmission shall be deemed to be mandated to manage the right on behalf of that right holder.

(3) Where more than one collective management organisation manages rights of that category for the territory of that Member State, the right holder shall be free to choose which of those collective management organisations is deemed to be mandated to manage his or her right. If in such a situation the right holder does not choose the collective management organisation, it shall be for the Member State for whose territory the operator of the retransmission service seeks to clear rights for a retransmission to indicate which of the collective management organisations is deemed to be mandated to manage the right of that right holder.

(4) A right holder shall have the same rights and obligations resulting from the agreement between the operator of the retransmission service and the collective management organisation which is deemed to be mandated to manage his or her right as the right holders who have mandated that collective management organisation and shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the retransmission which includes his or her work or other protected subject matter.

(5) A Member State may provide that, where a right holder authorises the initial transmission within its territory of a work or other protected subject matter, the right holder shall be deemed to have agreed not to exercise his or her rights in

retransmission on an individual basis but to exercise them in accordance with this Regulation.

Article 4
Exercise of the rights in retransmission by broadcasting organisations

Article 3 shall not apply to the rights exercised by a broadcasting organisation in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other holders of copyright or by holders of related rights.

Article 5
Transitional provision

Agreements on the exercise of copyright and related rights relevant for the acts of communication to the public and the making available occurring in the course of provision of an ancillary online service as well as for the acts of reproduction which are necessary for the provision of, the access to or the use of an ancillary online service which are in force on *[the date mentioned in Article 7(2), to be inserted by OPOCE]* shall be subject to Article 2 as from *[the date mentioned in Article 7(2) + 2 years, to be inserted by OPOCE*] if they expire after that date.

Article 6
Review

(1) No later than *[3 years after the date mentioned in Article 7(2) to be inserted by OPOCE*], the Commission shall carry out a review of this Regulation and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee.

(2) Member States shall provide the Commission with the necessary information for the preparation of the report referred to in paragraph 1.

Article 7
Final provisions

(1) This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

(2) It shall apply from [*6 months following the day of its publication, to be inserted by OPOCE*].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*