

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(92) 526 final - SYN 358

Brussels, 2 December 1992

Amended proposal for a

COUNCIL DIRECTIVE

on the coordination of certain rules
concerning copyright and rights related
to copyright applicable to satellite
broadcasting and cable retransmission

(presented by the Commission pursuant to Article 149(3)
of the EEC-Treaty)

Explanatory memorandum

Introduction

On 11 September 1991 the Commission presented to the Council its proposal for a Council directive on the coordination of certain rules concerning copyright and neighbouring rights applicable to satellite broadcasting and cable retransmission.

The Economic and Social Committee delivered its opinion on the proposal on 26 February 1992.

The European Parliament, consulted under the cooperation procedure, discussed the proposal in detail in its Committees and on 26 October 1992 debated the report drawn up on behalf of the Committee on Legal Affairs and Citizen's rights by Mr. Medina Ortega, voting in support of the proposed directive on 29 October 1992.

The amended proposal for a Directive put forward here is intended to take into account the Opinion of the European Parliament.

The amended proposal contains six major modifications to the original proposal :

- a) The definition of "communication to the public by satellite" has been clarified in several aspects following the amendment of the European Parliament, which endorsed the country-of-origin solution for satellite broadcasting. This clarification covers two aspects : the description of the act of communication to the public and the question, what happens in situations where the communication to the public takes place outside the Community.
- b) Following the amendment from the European Parliament it is stated in article 1 paragraph 5 that at least the principal director of a cinematographic work shall be its author.

- c) Following the Opinion of the European Parliament the amended proposal provides for a limited recognition of the Scandinavian model of extended collective agreements. This system provides for the extension of collective agreements between collecting societies and broadcasters to all the rightholders of the same category, even those who were not represented by the collecting society at the negotiating table. The interests of the latter are safeguarded by additional restrictive conditions on the operation of such systems.

- d) Article 4 establishes coherence with Council directive 92/100. The level of protection for rights related to copyright is aligned to the standard recognized by directive 92/100 as far as communication to the public by satellite is concerned. The alignment also includes two amendments of the European Parliament.

- e) In article 11 paragraphs 3 and 4 have been added on the basis of the amendment from the European Parliament. The addition enhances transparency of the process of negotiation between cable operators and rightholders without, however, changing the purely contractual character of the acquisition of cable rights.

- f) Articles 13 and 16 of the initial proposal were removed to the recitals. Both articles were of a declaratory nature. The European Parliament therefore suggested to remove article 16. This, however does not change the legal situation, as the articles of the EEC Treaty, in any event, take precedence over a directive.

Furthermore there are a number of purely linguistic adaptations which in particular seek to align the language used to that used in the Council directive 92/100. Additional clarifications have been undertaken in order to comply the European Parliament's with general suggestion to render the text more readily accessible.

COMMENTARY ON THE TITLE AND THE RECITALS

Title

The modification ensures linguistic coherence with the language used in Council directive 92/100. Furthermore, following the amendment of the European Parliament the legal basis has been extended to article 66 of the Treaty in order to make sure that the directive will also cover situations of provision of services.

Recital 6

The change is of a linguistic nature only.

Recital 11

The modification of this recital was necessary in order to adapt it to the new language of article 12.

Recital 14

The modification of this recital was necessary in order to adapt it to the new formulation of the European Parliament concerning the definition of a communication to the public by satellite. Another amendment of the European Parliament concerning normal technical procedures of signal-processing was added to this recital.

Recital 15

This new recital takes up the suggestion of the European Parliament by clarifying the effect of the country-of-origin principle for satellite broadcasting.

Recital 16

This new recital which is based on the amendment of the European Parliament explains the scope of contractual freedom guaranteed by this directive.

Recital 17

This recital has been aligned to the new formulation for article 3 paragraph 1 as proposed by the European Parliament. According to the new article the remuneration for a broadcast should take into consideration all the aspects of the broadcasts.

Recital 19

During the debates in the European Parliament the possible problem of delocalization of broadcasters to low-protection countries has been evoked. This problem is not so much a problem within the Community because of the harmonization provided for by this directive, but rather one which concerns the protection granted in third countries. In this respect article 1 paragraph 2 provides for additional points of attachment for the application of Community law in situations where the communication to the public by satellite occurs in a third country that does not offer the same degree of protection.

Recital 20

The modifications are of a linguistic nature only.

Recital 21

This recital was proposed by the European Parliament. The recital strengthens and clarifies the relation between the recognition of the country-of-origin principle on the one hand and the need to provide for an adequate protection of rightholders on the other. The harmonization of the level of protection in all the twelve Member States will prevent broadcasting organizations from seeking to avoid copyright liability by conducting their operation from a low-protection country.

Recital 22

This modification is explained by the fact that the standard of protection for rights related to copyright has been aligned to that contained in Council directive 92/100.

Recital 23

The change is of a linguistic nature only. Furthermore the recital clarifies that the exception for existing legal license schemes for cable retransmission is limited in time.

Recital 25

This recital was proposed by the European amendment. It clarifies, as does the European Parliament's amendment to article 10 paragraph 2 that the derogation for broadcasting organizations does not limit rightholders in transferring their cable retransmission rights to collecting societies rather than to the broadcaster.

Recital 26

This recital takes up the idea of general contracts which was initially contained in the text as a separate article. It encourages rightholders and cable operators to address the retransmission of a number of broadcasts by a number of cable operators in a single contract. Furthermore, there have been modifications for the purpose of linguistic coherence.

Recital 29

Modifications have been added for the purpose of linguistic coherence.

COMMENTARY ON THE ARTICLES

CHAPTER I

GENERAL PROVISIONS

Article 1 paragraph 1

These modifications take up the general pre-occupation of the European Parliament regarding the technical language used by the directive. Furthermore, the deletion of the terms "broadcasting satellite" and "telecommunications satellite" takes stock of technological developments which allow for hybrid satellites that can fulfil the functions of a telecommunications satellite as well as that of a broadcasting satellite.

Article 1 paragraph 2

The new formulation of this paragraph is based on the amendment adopted by the European Parliament. This amendment contributes to the clarification of the initial concept contained in the proposal according to which the act of communication to the public by satellite exclusively occurs in the country of origin of the communication. The communication to the public by satellite is an act of exploitation of protected works. The control of this act can only be assured at the source. The act of communication is characterized by both conceptual and technical elements: it is in fact the combination of a signal intended for reception by the public with a cultural content. Therefore according to the European Parliament there is communication to the public by satellite when the content and the support are linked in an indissociable manner. The broadcaster who links the signal and the content in this indissociable manner ("under the control and responsibility of the broadcaster") is responsible for the communication to the public by satellite. Once the signals have been introduced under the control and responsibility of the broadcaster, normal technical procedures relating to the programme-carrying signals cannot be considered an interruption of the chain as long as they are undertaken under the control and responsibility of the broadcaster.

In addition, this paragraph contains rules for the communication to the public that takes place outside the Community. The debates in the European Parliament have shown the dangers of delocalization of broadcasters to low-protection countries. This problem is not so much a problem within the Community, but rather one which concerns the protection granted in third countries. Article 1 paragraph 2 provides a harmonized solution in situations where the protection offered in the third country is lower than that provided for in the Community. If in these circumstances a point of attachment in the form of an up-link or a responsible broadcaster can be found within the Community, then the communication to the public is deemed to have taken place within the Community. The word "commissioned" in this context aims at situations where the programmes are essentially assembled within the Community and then sent in recorded form to broadcasting facilities outside the Community.

Article 1 paragraph 3

This paragraph merges the former two paragraphs c and d according to the amendment proposed by the European Parliament. This avoids a definition of broadcasting which in fact is not necessary for the purposes of chapter III.

Article 1 paragraph 4

The definition of what constitutes a collecting society has been reformulated in the light of the amendments of the European Parliament. The Commission agrees with the European Parliament that this definition should be sufficiently large to cover all types of collecting societies operating under Member States' legislations. What is important for the purpose of chapter III of the proposal is that the collecting societies are in a position to channel the individual authorizations of all the rightholders concerned by a simultaneous, unaltered and unchanged cable retransmission.

Article 1 paragraph 5

This additional paragraph was already accepted in Council directive 92/100. It seems appropriate to ensure the same degree of protection in the context of this directive, in particular as satellite broadcasting is a genuinely transnational phenomenon. In the absence of a harmonized level of protection distortions of competition to the detriment of rightholders could not be excluded.

CHAPTER II

BROADCASTING OF PROGRAMMES BY SATELLITE

Article 2

The modification is of a purely linguistic character.

Article 3 paragraph 1

The modification according to which the remuneration for a satellite broadcast should be based on all the characteristics of that broadcast was proposed by the European Parliament. In particular, this modification avoids possible misunderstandings according to which the remuneration is exclusively based on the characteristics of the country of origin.

Article 3 paragraph 2

This modification was proposed by the European Parliament. It recognizes the system for collective extended agreements. These systems exist in all Scandinavian countries and are in line with harmonization put forward by the Nordic Council. According to these systems collective agreements concluded between a collecting society and a broadcasting organization may be extended to rightholders not represented by the collecting society.

However, in order to strike a fair balance between right-holders on the one side and broadcasters on the other and in particular to avoid disadvantages for non-represented rightholders the European Parliament has added a number of restrictive conditions such as a right of opposition which can be exercised individually or collectively and a condition that collective agreements may only be extended in the case of a simultaneous broadcast by satellite and terrestrial means. The latter condition, in particular, ensures that the system can more or less only be applied in the context of national broadcasting and therefore negative cross-frontier effects are excluded.

Article 4 paragraph 1

The European Parliament and the Commission have always recognized the necessary link between the recognition of the country-of-origin solution for satellite broadcasts and the need to harmonize the level of protection for authors, performers, phonogram producers and broadcasters throughout the Community. Without a common standard of protection the country-of-origin solution for satellite broadcasts could favour the creation of copyright havens and lead to considerable distortions of competition. Satellite operators could establish themselves in the Member State that grants the lowest level of protection and cover the whole of the Community from there.

With regard to the protection of rights of performers, phonogram producers and broadcasters the Council has in the meantime adopted Council directive 92/100 which on initiative of the European Parliament harmonizes the standard for the protection of these categories of rightholders. Therefore, the present proposal can refer to articles 6, 7 and 8 of directive 92/100 and to adding the country-of-origin principle for the purpose of broadcasting by satellite. Articles 6, 7 and 8 of Council directive 92/100 grant fixation rights, reproduction rights and broadcasting rights for the three categories of rightholders. The amendment of the European Parliament according to which the remuneration for a broadcast should be divided between the performers and the phonogram producers is already reflected in article 8 paragraph 2 of Council directive 92/100.

Article 4 paragraph 2

This paragraph is necessary to ensure that all forms of television (satellite or terrestrial) are treated in the same way. As far as the communication to the public by satellite is concerned the country-of-origin solution applies.

Article 4 paragraph 3

Paragraph 3 takes up an amendment of the European Parliament, according to which also in the field of rights related to copyright the remuneration for a communication to the public should take into account all the characteristics of the broadcast. Furthermore, this amendment clarifies that, without prejudice to article 10 of directive 92/100 the acquisition of rights must be a contractual.

Article 5

This modification was proposed by the European Parliament. It reflects the formulation of article 1 of the International Rome Convention on the protection of Performers, Phonogram Producers and Broadcasting Organizations of 1961.

Article 6

The text has been adapted to the new numbering of articles. The purpose of this article is to guarantee the application of article 1 paragraphs 1 and 2 also in the following two types of situations:

- where national legislations grant rights for the communication to the public to other categories of rightholders not mentioned by this directive or
- where such right is granted to phonogram producers or performers in deviation from the minimum standard provided for by article 8 paragraphs 1 and 2 of Council directive 92/100.

Article 7

The modification is of a linguistic nature and adapts the content to the new article 4 paragraph 2.

Article 8

This is a modification for purposes of linguistic coherence with Council directive 92/100.

Article 9 paragraph 1

The last phrase of this paragraph takes up the amendment from the European Parliament which clarifies the mandate of the collecting society concerned.

Article 9 paragraph 2

The new formulation is based on an amendment of the European Parliament and addresses the situation where a rightholder has neither transferred his rights to a collecting society nor has he mandated a collecting society. In this situation the rightholder will be deemed to have given a mandate to the collecting society that manages the same category of rights. As a consequence the rightholder will enjoy the same right and obligations resulting from the contract between the collecting society and the cable-operator. For the sake of legal security for both, the rightholder and the collecting society respectively the rights should be claimed within a period of 2 years.

If there are more than one collecting society which acted on behalf of rightholders of the same category of rights than the non-represented rightholder has a right to choose the one or the other collecting society for claiming his rights.

Article 10 paragraph 1

This modification clarifies the exact scope of the derogation provided for broadcasting organizations.

Article 10 paragraph 2

This modification results from an amendment of the European Parliament. It clarifies that the derogation for broadcasters from the obligation to pass through a collecting society does not limit the choice of rightholders to cede their cable rights to a broadcaster or a collecting society or to entrust the negotiation of the remuneration only to a collecting society.

Article 11 paragraph 3

These modifications are based on the amendments proposed by the European Parliament. Paragraphs 3 and 4 reinforce the system of contractual "checks and balances" provided for under the proposal and at the same time enhance transparency of the contractual negotiations between rightholders and cable operators. The rule that the recommendation is considered to be accepted if neither party opposes the recommendation issued by the mediators during a period of three months does not impinge on the purely contractual character of the acquisition of cable retransmission rights. Parties are entirely free to decide whether they declare and motivate their opposition to the recommendation of the mediators or whether they do not. The purpose of the modification is merely to enhance transparency of the negotiating process by requiring parties to clearly state their position.

Article 11 paragraph 4

This modification clarifies that it is not necessary for the Member State to choose the mediators.

Article 12

This modification expounds the initial text in two respects following the general suggestion of the European Parliament to render the language of the text more readily accessible. The modifications indicate the possibilities for implementation of this provision and at the same time replace the vague notion of "improperly" by the more explicit formulation of "without valid justification".

Article 13

This modification clarifies the extent to which the regulation of the activities of collecting societies remains a matter for the Member States.

PROPOSAL FOR A COUNCIL DIRECTIVE ON THE COORDINATION OF CERTAIN RULES CONCERNING COPYRIGHT AND NEIGHBOURING RIGHTS APPLICABLE TO SATELLITE BROADCASTING AND CABLE RETRANSMISSION

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57(2) thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

(1) Whereas the objectives of the Community as laid down in the Treaty include establishing an ever closer union among the peoples of Europe, fostering closer relations between the States belonging to the Community, and ensuring the economic and social progress of the Community countries by common action to eliminate the barriers which divide Europe;

AMENDED PROPOSAL

PROPOSAL FOR A COUNCIL DIRECTIVE ON THE COORDINATION OF CERTAIN RULES CONCERNING COPYRIGHT AND RIGHTS RELATED TO COPYRIGHT APPLICABLE TO SATELLITE BROADCASTING AND CABLE RETRANSMISSION

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57(2) and 66 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Unchanged

(2) Whereas to that end the Treaty provides for the establishment of a common market and an area without frontiers; whereas this is to include the abolition of obstacles to the free movement of services and the institution of a system ensuring that competition in the common market is not distorted; whereas to that end the Council may adopt directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons;

(3) Whereas broadcasts transmitted across frontiers within the Community, in particular by satellite and cable, are one of the most important ways of pursuing these Community objectives, which are at the same time political, economic, social, cultural and legal;

Unchanged

Unchanged

(4) Whereas the Council has already Unchanged
adopted Directive 89/552/EEC of
3 October 1989 on the
coordination of certain
provisions laid down by law,
regulation or administrative
action in Member States
concerning the pursuit of
television broadcasting
activities⁽¹⁾, which makes
provision for the promotion of
the distribution and production
of European television
programmes and for advertising
and sponsorship, the protection
of minors and the right of
reply;

(1) OJ N° L 298, 17.10.1989, p. 23.

- (5) Whereas, however, the achievement of these objectives in respect of cross-border satellite broadcasting and the cable retransmission of programmes from other Member States is currently still obstructed by a series of differences between national rules of copyright and some uncertainties as to the law; whereas this means that holders of rights are exposed to the threat of seeing their works exploited without payment of remuneration or that the individual holders of exclusive rights in various Member States block the exploitation of their rights; whereas the legal uncertainty in particular constitutes a direct obstacle to the free circulation of programmes within the Community;
- (6) Whereas a distinction is currently drawn for copyright purposes between broadcasting by direct satellite and broadcasting by communications satellite; whereas since individual reception is possible and nowadays affordable with both types of satellite, there is no longer any justification for this differing legal treatment;
- Unchanged
- (6) Whereas a distinction is currently drawn for copyright purposes between communication to the public by direct satellite and communication to the public by communications satellite; whereas since individual reception is possible and nowadays affordable with both types of satellite, there is no longer any justification for this differing legal treatment;

- (7) Whereas the free broadcasting of programmes is further impeded by the current legal uncertainty as to whether broadcasting by a satellite whose signals can be received directly affects the rights in the country of transmission only, or in all countries of reception together; whereas since communications satellites and direct satellites are treated alike for copyright purposes, this legal uncertainty now affects almost all programmes broadcast in the Community by satellite; Unchanged
- (8) Whereas, furthermore, the legal certainty, which is a prerequisite for the free movement of broadcasts within the Community, is missing where programmes transmitted across frontiers are fed into and retransmitted through cable networks; Unchanged
- (9) Whereas the development of the acquisition of rights on a contractual basis is already making a vigorous contribution to the creation of the desired European audiovisual area; whereas the continuation of such contractual agreements should be ensured, and their smooth application in practice should be promoted wherever possible; Unchanged

(10) Whereas at present cable-operators in particular cannot be sure to have actually acquired all the programme rights covered by such an agreement;

Unchanged

(11) Whereas, lastly, parties in different Member States are not all similarly bound by obligations which prevent them from improperly refusing to negotiate on the acquisition of the rights necessary for cable distribution or improperly allowing such negotiations to fail;

(11) Whereas, lastly, parties in different Member States are not all similarly bound by obligations which prevent them from without valid reason refusing to negotiate on the acquisition of the rights necessary for cable distribution or allowing such negotiations to fail;

(12) Whereas the legal framework for the creation of a single audiovisual area laid down in Directive 89/552/EEC must therefore be supplemented with reference to copyright;

Unchanged

(13) Whereas, therefore, an end Unchanged
should be put to the differences
of treatment of the transmission
of programmes by communications
satellite which exists in the
Member States, so that the vital
distinction throughout the
Community becomes whether
protected works and other
protected matter are
communicated to the public;
whereas this will also ensure
equal treatment of the suppliers
of cross-border broadcasts,
regardless of whether they use a
direct broadcasting satellite or
communications satellite;

(14) Whereas the legal uncertainty regarding the rights to be acquired which impedes cross-border satellite broadcasting will be overcome by defining the notion of communication to the public by satellite at a Community level; whereas this definition will at the same time specify where the act of communication takes place; whereas such a definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting;

Whereas communications to the public occurs only when and in the Member State where a broadcasting organization takes a single decision on the content and the transmission of programme-carrying signals; whereas there is no communication if the chain of broadcasting equipment between the point where such single decision is taken and the transmission of the relevant signals from the satellite is interrupted;

(14) Whereas the legal uncertainty regarding the rights to be acquired which impedes cross-border satellite broadcasting will be overcome by defining the notion of communication to the public by satellite at a Community level; whereas this definition will at the same time specify where the act of communication takes place; whereas such a definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting;

Whereas communication to the public by satellite occurs only when and in the Member State, where the programme carrying signals are introduced under the control and responsibility of the broadcasting organization into an uninterrupted chain of communication leading to the satellite and down towards the earth; whereas normal technical procedures relating to programme-carrying signals may not be considered as interruptions to the chain of broadcasting;

(15) Whereas the acquisition on a contractual basis of exclusive broadcasting rights should comply with any legislation on copyright and rights related to copyright in the Member State in which "communication to the public by satellite" occurs;

(16) Whereas the principle of contractual freedom, on which this Directive is based, will make it possible to continue limiting the exploitation of these rights, especially as far as certain technical means of transmission or certain language versions are concerned;

(15) Whereas in arriving at the amount of the payment to be made for the rights acquired the parties should take account of the actual or potential audience throughout the area in which the broadcast can be received;

(17) Whereas in arriving at the amount of the payment to be made for the rights acquired the parties should take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version;

(16) Whereas a special transitional provision applicable to existing agreements should be provided for so that at the latest by 1998 these agreements will be adapted in the light of the new legal framework;

(18) Unchanged

(17) Whereas programmes broadcast from non-member countries to the territory of the Community will be outside the scope of this Directive; whereas they may be treated differently in the law of the Member States from programmes transmitted from a Member State is the protection provided for by this Directive is not granted in the non-member country or only granted to a lesser extent;

(18) Whereas the arrangements made should also include provisions for the protection of holders of copyrights and neighbouring rights; whereas it is necessary to ensure that protection for specific categories is accorded in all Member States to the extent provided for by this Directive and that this protection is not subject to a statutory licence system; whereas only in this way is it possible to ensure that any difference in the level of protection within the common market will not create distortions of competition which might result in an unjustified disadvantage for programme suppliers and holders of rights in Member States with a high level of protection;

(19) Whereas communications to the public by satellite from non-member countries will under certain conditions be deemed to occur within a Member State of the Community.

(20) Whereas it is necessary to ensure that protection for authors, performers, producers of phonograms and broadcasting organizations is accorded in all Member States and that this protection is not subject to a statutory licence system; whereas only in this way is it possible to ensure that any difference in the level of protection within the common market will not create distortions of competition;

- (19) Whereas the minimum protection provided for neighbouring rights is mainly taken from the substance of the Rome Convention of the Protection of Performers, Producers of Phonograms and Broadcasting Organizations which at present must be considered to provide the most comprehensive standard of protection of neighbouring rights in the international field; whereas this standard has been accepted by the majority of Member States; whereas this standard has been accepted by the majority of Member States; whereas, however, in accordance with the aims of this Directive, it is not appropriate to allow for derogations corresponding to those provided for in the Rome Convention;
- (20) Whereas the harmonization of legislations envisaged in this Directive entails the harmonization of the provisions ensuring a high level of protection of authors, performers, phonogram producers and broadcasting organizations; whereas this harmonisation will no longer allow a broadcasting organization to take advantage of differences in levels of protection by relocating activities, to the detriment of audiovisual production.
- (21) Whereas the protection provided for rights related to copyright is aligned to that contained in Council directive 92/100 for the purposes of communication to the public by satellite; whereas in particular this will ensure that performers and phonograms producers are guaranteed an appropriate remuneration for the communication to the public by satellite of their performances or phonograms;

(20) Whereas the cable retransmission of programmes from other Member States is an act subject to copyright and neighbouring rights; whereas the cable operator must therefore obtain the authorization from every holder of rights in each part of the programme retransmitted; whereas, under this Directive, the authorizations should be granted contractually unless an exception is provided for in the case of existing legal licence schemes;

(23) Whereas the cable retransmission of programmes from other Member States is an act subject to copyright and, as the case may be, rights related to copyright; whereas the cable operator must therefore obtain the authorization from every holder of rights in each part of the programme retransmitted; whereas, under this Directive, the authorizations should be granted contractually unless a temporary exception is provided for in the case of existing legal licence schemes;

(21) Whereas, this Directive, through the obligation to have recourse to a collecting society, provides for the exclusive collective exercise of the authorization right to the extent that this is required by the special features of cable retransmission; whereas this Directive is thereby seeking to ensure that the smooth operation of contractual arrangements is not called into question by the intervention of outsiders holding rights in individual parts of the programme; whereas the authorization right as such remains intact and only the exercise of this right is regulated to some extent, so that the right to authorize a cable retransmission can still be assigned; whereas this Directive does not affect the exercise of moral rights;

(24) Unchanged

(25) Whereas the exemption provided for in Article 10 does not limit the choice of holders of rights to transfer their rights to a collecting society and thereby have a direct share in the remuneration paid by the cable distributor for cable retransmission;

(22) Whereas contractual agreements regarding the authorization of cable retransmission shall be promoted by additional measures; whereas, to begin with, all the rights necessary for a cable retransmission should be acquired in the form of a general contract; whereas, furthermore, any party shall be entitled, at any moment, to call upon the assistance of impartial mediators whose task it is to assist negotiations and to put forward non-binding proposals; whereas, finally, it is necessary to ensure that the negotiations are not improperly blocked or that individual holders of rights are not improperly prevented from taking part in the negotiations; whereas none of these measures for the promotion of the acquisition of rights calls into question the contractual nature of the acquisition of cable rights;

(23) Whereas, however, Community rules are not needed to deal with all of those matters whose effects, perhaps with some commercially insignificant exceptions, are felt only inside the borders of a single Member State;

(26) Whereas contractual agreements regarding the authorization of cable retransmission shall be promoted by additional measures; whereas a party seeking the conclusion of a general contract should for its part be obliged to submit collective proposals for an agreement; whereas, furthermore, any party shall be entitled, at any moment, to call upon the assistance of impartial mediators whose task it is to assist negotiations and to put forward non-binding proposals; whereas, finally, it is necessary to ensure that the negotiations are not blocked without valid justification or that individual holders are not prevented without valid justification from taking part in the negotiations; whereas none of these measures for the promotion of the acquisition of rights calls into question the contractual nature of the acquisition of cable rights;

(27) Unchanged

(24) Whereas this Directive lays down the minimum rules needed to establish and guarantee free and uninterrupted cross-border broadcasting by satellite and simultaneous, unaltered cable retransmission of programmes broadcast from other Member States, on what is essentially a contractual basis;

(25) Whereas this Directive does not prejudice further harmonization in the field of copyright and neighbouring rights and the collective administration of such rights;

(26) Whereas it is therefore a matter for the Member States to supplement the general provisions needed to achieve the objectives of this Directive by taking legislative and administrative measures in their domestic law, provided these do not run counter to the objectives of this Directive and are compatible with Community law; whereas, in particular, Member States are accordingly free to lay down rules for the protection of rights related to copyright which go beyond those provided for in this Directive;

(28) Unchanged

(29) Whereas this Directive does not prejudice further harmonization in the field of copyright and rights related to copyright and the collective administration of such rights;

(30) Whereas it is therefore a matter for the Member States to supplement the general provisions needed to achieve the objectives of this Directive by taking legislative and administrative measures in their domestic law, provided these do not run counter to the objectives of this Directive and are compatible with Community law;

(27) Whereas this Directive does not affect the applicability of the competition rules in Articles 85 and 86 of the Treaty,

(31) Unchanged

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

CHAPTER I

DEFINITIONS

GENERAL PROVISIONS

Article 1

Article 1

For the purpose of this Directive:

For the purpose of this Directive:

(a) "satellite" means any satellite operating either on frequencies which under telecommunications law allow reception by the public (a broadcasting satellite) or on frequencies which are reserved for closed, point-to-point communication (a communications satellite). In the latter case, however, the circumstances in which individual reception of the signals takes place must be comparable to those which apply in the case of broadcasting satellites;

(1) "satellite" means any satellite operating on frequency bands which, under telecommunications law, are reserved for the broadcast of signals for reception by the public or which are reserved for closed, point-to-point communication. In the latter case, however, the circumstances in which individual reception of the signals takes place must be comparable to those which apply in the first case.

(b) "communication to the public by satellite" inside the Community means the act of taking a single decision on the content and the transmission by satellite of programme-carrying signals by the broadcaster. This act of communication to the public by satellite occurs in the Member State where the broadcaster takes the single decision on the content and the transmission by satellite of programme-carrying signals. If the programme-carrying signals are encrypted, communication to the public by satellite means the act of taking a single decision on the content and the transmission of the programme carrying signals under the condition that decoders are provided to the public by the broadcaster himself or with his approval. There is no communication to the public by satellite, however, if there is any interruption of the chain of broadcasting equipment between the point where a single decision is taken and the transmission of the relevant signals from the satellite;

(2) "communication to the public by satellite" means the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(a) The act of communication to the public by satellite occurs solely in the Member State where under the control and responsibility of the broadcasting organization the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(b) If the programme-carrying signals are encrypted, then there is communication to the public by satellite under the condition that means for the decrypting of the broadcast are provided to the public by the broadcasting organization or with his consent.

(c) Where an act of communication to the public by satellite occurs in a non-Community State in which the protection provided under Chapter II of this Directive does not exist, and

- if the programme-carrying signals are transmitted to the satellite from an uplink station situated in a Member State, the act of communication to the public shall be deemed to have occurred in that Member State and the rights provided for under Chapter II shall be exercisable against the person operating the uplink station, or

- if there is no use of an up-link station situated in a Member State but a broadcasting organization established in a Member State has commissioned the act of communication to the public, that act shall be deemed to have occurred in that Member State and the rights provided for under Chapter II shall be exercisable against the broadcasting organization:

(c) "cable retransmission" means the simultaneous, unaltered and unabridged retransmission of a broadcast from another Member State by a cable or microwave system for reception by the public;

(d) "broadcasting" means the initial transmission, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public;

(e) "collecting society" means an organization whose members have appointed it to manage copyright or related rights.

(3) "cable retransmission" means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public;

Deleted

(4) "collecting society" means any organization which manages or administers copyright or rights related to copyright.

(5) For the purposes of this Directive the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.

CHAPTER II

BROADCASTING OF PROGRAMMES
BY SATELLITE

Article 2
Broadcasting right

Member States shall provide a right for the author to authorize or to prohibit the communication to the public by satellite of copyright works, subject to the provisions set out in this Chapter.

Article 3
Acquisition of broadcasting rights

(1) Member States shall ensure that the right referred to in Article 2 may be acquired only by agreement.

CHAPTER II

BROADCASTING OF PROGRAMMES
BY SATELLITE

Article 2
Broadcasting right

Member States shall provide an exclusive right for the author to authorize or prohibit the communication to the public by satellite of copyright works, subject to the provisions set out in this Chapter.

Article 3
Acquisition of broadcasting rights

(1) Member States shall ensure that the authorization referred to in Article 2 may be acquired only by agreement. The remuneration shall be stated in the agreement and shall take account of all aspects of the broadcast.

(2) Where, on 31 July 1991, it is provided by a Member State that an agreement between a collecting society and a broadcasting organization may be extended to include holders of rights not represented by the collecting society, this shall continue to be possible until 31 December 1997.

(3) Paragraph 2 shall not apply to cinematographic works, including works created by a process analogous to cinematography.

(2) A Member State may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works may be extended to rightholders of the same category who are not represented by the collecting society provided that:

- the communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcasting organization and;
- the unrepresented rightholder shall, at any time, have the possibility of excluding the effect of the extension of the collective agreement to his rights and of exercising his rights either individually or collectively.

(3) Unchanged

Article 4

Performers

Member States shall provide that performers shall enjoy the right:

- to authorize or prohibit the communication to the public by satellite of their performance except where the performance used in the broadcasting is itself already a broadcast performance or is made from a fixation;

- to authorize or prohibit the fixation of their unfixed performances;

- to authorize or prohibit the reproduction of a fixation of their performance.

Article 4

Rights related to copyright

(1) For the purposes of communication to public by satellite, the Member States shall provide that the rights of performers, phonogram producers and broadcasting organizations are protected in accordance with the provisions of Articles 6, 7, 8 and 10 of Council Directive 92/100.

(2) For the purposes of paragraph 1, "broadcasting by wireless means" in Council Directive 92/100 shall be understood as including communication to the public by satellite as set out in Article 1 paragraph 2.

(3) The provisions laid down in Article 3, paragraph 1, of this Directive shall apply to the acquisition of rights granted to performers and broadcasting organizations under Article 8 of Council Directive 92/100, without prejudice to the provisions of Article 10 of Council Directive 92/100.

Article 5
Remuneration for the
use of phonograms

Deleted

Member States shall provide that if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for a communication to the public by satellite, a single equitable remuneration shall be paid to the performers, or to the producers of the phonograms, or to both.

Article 6
Broadcasting organizations

Deleted

Member States shall provide that broadcasting organizations shall enjoy the right to authorize or prohibit:

- the simultaneous retransmission of their broadcasts by satellite;
- the fixation of their broadcasts;
- the reproduction of fixations of their broadcasts.

Article 7
Limitations on rights

Deleted

(1) Member States may provide for limitations to the protection guaranteed by Articles 4, 5 and 6 only as regards:

- private use;
- use of short excerpts in connection with the reporting of current events;
- ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts;
- use solely for purposes of teaching or scientific research.

(2) Notwithstanding paragraph 1 of this Article, any Member State may provide for the same kinds of limitation with regard to the protection of performers, producers of phonograms and broadcasting organizations as it provides for in its legislation concerning the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

Article 5

Relation between copyright and related rights

Protection of copyright-related rights under this Directive shall leave intact and shall in no way affect the protection of copyright.

Article 8

Minimum protection

- (1) Member States may provide for more far-reaching protection for authors, and holders of neighbouring rights under their jurisdiction than that required by Articles 2 to 6.
- (2) In applying paragraph 1 Member States shall observe the definitions contained in points (a) and (b) of Article 1.

Article 9

Transitional provision

Agreements concerning the exploitation of protected works and services, in force on 1 January 1995, shall not be subject to Articles 2 to 8 until 31 December 1997 if they expire after that date.

Article 6

Minimum protection

- (1) Member States may provide for more far-reaching protection for holders of rights related to copyright than that required by Article 8 of Council Directive 92/100.
- (2) In applying paragraph 1 Member States shall observe the definitions contained in paragraphs 1 and 2 of article 1.

Article 7

Transitional provision

Agreements concerning the exploitation of protected works and subject matter, in force on 1 January 1995, shall be subject to the provisions of Articles 2, 3 and 4 paragraph 2 from 1 January 1998 on if they expire after that date.

CHAPTER III

CABLE RETRANSMISSION

Article 10

Cable retransmission right

- (1) Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and neighbouring rights are observed, and that such retransmission takes place on the basis of agreements between copyright owners, holders of neighbouring rights and cable operators.
- (2) Notwithstanding paragraph 1, Member States may retain until 31 December 1997 such statutory licence systems that are in operation or expressly provided for by the national law on 31 July 1991.

CHAPTER III

CABLE RETRANSMISSION

Article 8

Cable retransmission right

- (1) Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and rights related to copyright are observed, and that such retransmission takes place on the basis of agreements between copyright owners, holders of rights related to copyright and cable operators.
- (2) Unchanged

Article 11

**Exercise of the cable
retransmission right**

(1) Member States shall ensure that the right of copyright owners and holders of neighbouring rights to authorize or prohibit the cable retransmission of a broadcast may be exercised only through a collecting society.

Article 9

**Exercise of the cable
retransmission right**

(1) Member States shall ensure that the right of copyright owners and holders of rights related to copyright to grant or refuse authorization to a cable operator for the cable retransmission of a broadcast may be exercised only through a collecting society representing the professional categories concerned.

(2) A holder of a right who has not transferred the management of his rights to a collecting society shall have a claim to compensation on the collecting society which manager rights of the same category. His claim shall be confined to the sum which he would have received if he had mandated the collecting society to exercise his rights.

(2) Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to manage his rights. A rightholder referred to in this paragraph shall enjoy the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the members of that collecting society and he shall be able to claim those rights, within a period of two years.

Article 12

Exercise of the cable
retransmission right by
broadcasting organizations

Article 11 shall not apply to the rights exercised by a broadcasting organization in respect of its own transmissions.

Article 10

Exercise of the cable
retransmission right by
broadcasting organizations

- (1) Member States shall ensure that Article 9 does not apply to the rights exercised by a broadcasting organization in respect of its own transmissions, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of rights related to copyright.
- (2) The derogation provided for in paragraph 1 shall be without prejudice to the option for copyright owners and holders of rights related to copyright to claim, through their collecting societies, direct participation in the remuneration paid by cable operators for cable retransmission.

Article 13

General contracts

Member States shall ensure that a party seeking the conclusion of a general contract is for its part obliged to submit collective proposals for an agreement.

Deleted

Article 14
Mediators

Article 11
Mediators

(1) Where no agreement is concluded regarding authorization of the cable retransmission of a broadcast, Member States shall ensure that either party may call upon the assistance of one or several mediators referred to in paragraphs 2 and 3.

(2) The mediators shall have the task of providing assistance with negotiation. They may also submit non-binding recommendations to the parties.

(3) Member States shall ensure that the mediators are so selected that their impartiality is beyond doubt.

(1) Unchanged

(2) Unchanged

(3) If neither of the parties expresses and motivates its opposition to this recommendation within a period of three months from the notification of the recommendation to the parties it is presumed that all the parties accept the recommendation.

(4) The mediators shall be so selected that their neutrality and impartiality are beyond doubt.

Article 15

**Prevention of the abuse
of negotiating positions**

Member States shall ensure that the parties do not improperly prevent negotiation regarding authorization for cable retransmission.

Article 12

**Prevention of the abuse
of negotiating positions**

Member States shall ensure, by means of civil or administrative law, as appropriate, that the parties do not without valid justification prevent negotiation regarding authorization for cable retransmission.

CHAPTER IV

GENERAL PROVISIONS

Article 16

Competition rules

This Directive shall be without prejudice to the Community competition rules.

Article 17

**Collective administration
of rights**

The regulation of the activities of collecting societies shall be a matter for the Member States.

CHAPTER IV

GENERAL PROVISIONS

Deleted

Article 13

**Collective administration
of rights**

The provisions of this Directive shall be without prejudice to the regulation of the activities of collecting societies by the Member States.

Article 18
Final provisions

(1) Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 1995. They shall immediately inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

(2) Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

Article 19

This Directive is addressed to the Member States.

Done at Brussels,
For the Council,
The President,

Article 14
Final provisions

(1) Unchanged

(2) Unchanged

Article 15

Unchanged

47

ISSN 0254-1475

COM(92) 526 final

DOCUMENTS

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Catalogue number : CB-CO-92-547-EN-C

ISBN 92-77-50412-9

Office for Official Publications of the European Communities
L-2985 Luxembourg