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WORKING PAPER

CONTRIBUTION

From:	Portuguese delegation
To:	Working Party on Intellectual Property (Copyright)
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Subject:	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 - Comments from the Portuguese delegation

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

COMMENTS OF THE PORTUGUESE DELEGATION

Despite the fact that the Proposal is intended to leave outside its scope webcasting and the so-called Over The Top (OTT) services, to deal with the ancillary services only (namely Simulcasting and Catch-Up TV), PT is of the opinion that the future Regulation may be beneficial at this stage.

At this light:

RECITALS

Agreeing with the ES and FR Proposal of amendments, and to be in line with the suggestion made on articles 1a, 2 and 5, recitals 9 and 10 should be deleted.

PT also suggests the inclusion of a new Recital 13a *"(13a) In order to meet with consumer demands, the exercise of retransmission rights as defined in this Regulation and in Council Directive 93/83/EEC should also apply to functionalities, which are closely connected to the linear broadcast for which the retransmission rights are obtained. Time shifted services, which are only made available for a certain period of time, as agreed by contract between the parties, during or after the retransmission, such as internet-based PVR (personal video recording) and restart-TV, should be regarded as such functionalities."*

ARTICLES

Article 1 (a)

Amendment: Deleted

Article 2

Although technological shifts taken place in the digital environment do not necessarly entail the need for reassessment of current business models, PT would underline the following:

- In practical terms, the measures provided for in this Proposal do interfere with existing licensing schemes in place in the audiovisual and music fields;

- The ancillary services here foreseen are already licensed together with the retransmission services – licensing contracts between collective management bodies and cable distribution platform operators already include simulcasting and catch-up TV services;

- The principle of the State of destination should apply, since its alternative – the origin State principle is not adequate in the digital environment due to potential risks upon rightholders and further complexity of licensing schemes – the criterion of the main

establishment may not coincide with that of the editorial decision, and said system wouldn't in any case be feasible should the server be located in a third country. On the other hand, the possible tendency for contents in English could hinder cultural and linguistic diversity and the desired plurality. It should also be noted that said principle doesn't suit the interests of more peripheral countries where the import of contents tend to be higher that its export;

- As far as music goes, existing voluntary licensing schemes allow for greater flexibility for users, as well as for stronger protection for rightholders. The possibility of using the principle of the State of origin could nonetheless be taken into consideration if applicable only where there isn't voluntary multiterritorial licensing agreements in place;

- Also, with the view of safeguarding less disseminated repertoires and /or pertaining to smaller linguistic areas so as to ensure European cinema and audiovisual sectors, the territorial principle should be preserved;

- Compulsory collective management is in turn inadequate in this context too lacking legal grounds since the subject matter is an exclusive right of the rightholder. Such a compulsory system would prove to be disproportionate bearing in mind the envisaged objectives.

PT believes that the introduction of the principle of the State of origin applicable to online broadcasting bodies is unsatisfactory for it would be based on the assumption that activities are carried out in the Member State that body has its headquarters establishment, so the all article should be deleted.

Should this reasoning not be prevalent within this working group, PT suggests adding a new paragraph (1A), along the following lines:

"(1a) Paragraph 1 shall not apply to online services which, taken as a whole, are primarily or solely targeted at an audience in a Member State which is not the broadcasting organisation's country of principle establishment."

Article 3

Reference to compulsory collective management in case of retransmission should be deleted due inadequacy and harm to rightholders' exclusive power to authorise or prohibit the use of protected works.

Accordingly, PT suggests the deletion of "only" in paragraph 1, which should be sufficient to ensure contractual autonomy by rightholders.

Also, at the end of the 1st indent of paragraph 2 of Article 3 the following should be added "on behalf of that right holder, however said organization shall, within 5 days, seek the express consent of the right holder."

In this provision PT favours the solution of keeping reference to rightholders instead of "Member State".

Article 5

Amendment: Deleted

General Justification for the suggested amendments to recitals 9 and 10 and articles 1, 2, and 5

The proposed extension of the country of origin (CoO) principle to online transmission lacks justification.

No clear justification of the extension can be found in the public consultation conducted by the Commission nor in the impact assessment. The extension was rejected by most of the replies to the consultation. The impact assessment does not bring any evidence of the alleged difficulties in the cross border rights clearance faced by broadcasters.

On the contrary, the crucial role of territorial exclusivities in the financing of the audiovisual works, their pro-competitive effects and their anchoring in national culture and language are well documented, notably by studies of renowned economists commissioned by the European Commission itself (the Charles Rivers Associates study in particular) or more recently by the rightholders (Oxera study).

The proposal risks undermining the principle of territoriality and thus threatens the financing of the audiovisual sector.

By stating that the acts of communication to the public and of making available "are deemed to occur solely in the Member States in which the broadcasting organization has its principal establishment", the proposal tends to impose the development of pan European licenses in the audiovisual field.

If the possibility of rightholders to limit the exploitation of rights affected by the country of origin by contract is mentioned by Recital 11 of the proposal, this contractual freedom is seriously called into question in the context of the Commission's competition inquiry ("Cross –border access to pay-TV" case) that is challenging contractual arrangements that impose geoblocking obligations on broadcasters.

The difficulty to accurately define the scope of "ancillary services" that are targeted and the risk of an enlargement of the scope of the CoO provision should also be taken in to account, as well as he risk of forum shopping introduced by the proposal.

PT has no further comments on the text.

18/09/2017