

SUBMISSION
Creative Content in a European Digital Single Market

The AGICOA Alliance (hereinafter "AGICOA") welcomes the opportunity to contribute to the discussion that the Reflection Document of DG INFSO and DG Markt dated October 22, 2009 has recently opened:

The AGICOA Alliance is a network of collective management organizations (hereinafter "CMO"s) facilitating the cross-border distribution of audiovisual works in more than 38 countries. AGICOA licenses the rights of audiovisual producers from more than 42 countries in the field of simultaneous, unaltered and unabridged retransmission of TV channels.

Operating under the umbrella of the EU Satellite and Cable Directive, AGICOA actively contributes to the circulation of copyrighted audiovisual product in Europe. For this purpose AGICOA licenses the producers' retransmission rights in audiovisual content that is contained in TV programmes. These TV programmes are then retransmitted either in the country of origin of the TV broadcaster or into foreign countries.

AGICOA's licensing activities all over Europe allow European commercial users an easy rights clearance for the audiovisual content they want to retransmit. As a result AGICOA's licensing activities allow European consumers easy access to TV channels from all over Europe.

While AGICOA's contribution to the circulation of audiovisual works is *limited* to audiovisual content and its retransmission as a part of the cross border distribution of TV channels, AGICOA's experience might nevertheless be of interest for the EU Commission to analyze further whether AGICOA's limited example might allow to draw conclusions in the much the broader context of online dissemination of audiovisual and other copyrighted content.

The AGICOA example illustrates the following issues:

I.

It is important to note that EU Cable and Satellite Directive has accepted the prevailing business model of territorial licensing of film rights. Nevertheless, it has created viable mechanisms for the relevant market players and TV consumers to allow cross-border retransmission of TV channels and of the audiovisual works contained therein.

As merely technical developments with regard to transmission and retransmission ⁽¹⁾ risk to undermine the above positive impact of the EU Cable and Satellite Directive we call on the EU Commission's to clarify that the EU Cable and Satellite Directive regime for cable retransmission applies also in these new technical circumstances.

However, the EU Satellite and Cable Directive seems to have overestimated the need of cross-border retransmission of TV channels. It is interesting to note that the consumers' demand for other than domestic TV channels has constantly decreased over the last decades. Wherever cable TV subscribers can watch national TV channels they prefer these TV channels to foreign TV channels. Therefore, one can question how much of a demand there is of European consumers to have access to more audiovisual cross-border services.

II.

One of the above tools created by the EU Cable and Satellite Directive is the so-called *extended collective licensing* model whereby CMOs are deemed to represent *outsiders* that have not registered their works and rights with the CMOs.

The Reflection Paper mentions extended collective licensing as one of the aspects that might facilitate consumers' access to cross-border content (P.14, all following indications of pages refer to pages of the Reflection Paper). While AGICOA can't judge the value or appropriateness of extended collective licensing in other areas, extended collective management in the field of cable retransmission can indeed be viable tool to facilitate the administration of rights and the cross-border cable retransmission of audiovisual content. It also allows commercial users be protected against claims from these outsiders.

III.

On page 12 it is stated that cross border distribution of audiovisual content is facilitated also by another provision of the EU Satellite and Cable Directive: in order to avoid programming black-outs, the rights in a simultaneous cable retransmission of a programme originating in another member state are *managed collectively*.

Indeed, this "alternative legislative approach" is largely preferable to the approach that would consist in extending the *principle of exhaustion* to "performance copyright in films" as discussed on page 11. In this context it is important to note that the rationale of the Coditel I court ruling ("Le boucher") is still valid: there is no rule of Community exhaustion in respect of acts of cable retransmission. And there should be no such rule as it would otherwise violate the rightsholders' legitimate interest in licensing their content and receiving remuneration on the basis of the number of copyright restricted acts.

IV.

Furthermore, the Reflection Paper mentions on page 16 the so called "*one stop shop*" where commercial users can acquire the necessary rights through one single "*general licensing agreement*" that regroups on the rightsholders' side all relevant rightsholders.

While the Reflection Paper mentions the one stop shop in the field of music, AGICOA confirms that general licensing agreements play an important role in the field of retransmission of audiovisual works: in many European countries they have been facilitating cross-boarder retransmissions of audiovisual content for the benefit of both commercial users and consumers ⁽²⁾. However, these general licensing agreements do not relate to the direct licensing of content for initial transmission.

V.

Unlike so-called CISAC collecting societies with their territorial limitations ⁽³⁾ AGICOA has created one centralized database. In this database all audiovisual works and rights for various territories are bundled. This gives commercial users the opportunity to acquire *multi-territorial licenses* ⁽⁴⁾.

However, it is interesting to note that in AGICOA's more than 25 years of existence no user has ever requested to benefit from a multi-territorial license. Even though some cable TV retransmission companies work on a Europe-wide basis they are acquiring licenses from AGICOA on a country by country basis. It seems that TV consumers and commercial users (=cable TV operators) feel that there is a *no need for multi-territorial licenses* in the field of cable retransmission. On the contrary, a territorial licensing of retransmission rights together with the

beneficial effects of the Satellite and Cable Directive that allow cross border retransmission of foreign TV channels has so far fully lived up to the expectations of both commercial users and TV consumers.

The above does not only apply to traditional (analogue) cable retransmission but also to digital cable retransmission and notably IPTV ⁽⁵⁾

VI.

Should the DG INFSO and DG Markt be interested in knowing more about AGICOA's position and its underlying rationale AGICOA's representatives are happy to further contribute to the discussions about Creative Content in a European Digital Single Market.

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- (1) In cases where there is no free to air broadcast but only either encrypted signal transmission or a direct injection of the TV broadcasters' signals into the head ends of the cable retransmission network the application of the EU Satellite and Cable Directive has recently been questioned: as the signal transmission from the TV broadcaster to the cable platform operator is alleged not to be a (first) communication to the public the subsequent transmission from the cable operators to the households is allegedly no "re"-transmission. While this opinion deliberately overlooks the underlying economic rationale of copyright (both broadcasters and cable operators obtain revenue from the use of the copyrighted works) AGICOA suggests the EU Commission to clarify that this technological change has no influence on the existence of a retransmission in the sense of the EU Satellite and Cable Directive.
- (2) In the field of cable retransmission of TV channels general licensing agreements exist in Germany, Estonia, Latvia, Lithuania, Slovenia, Croatia, BiH, Macedonia, Albania, Bulgaria. General licensing agreements that regroup all relevant CMOs but do not include TV broadcasters exist for instance in the Netherlands.
- (3) Given the organizational differences between CISAC CMOs and AGICOA, AGICOA appreciates the clear statement of the EU on page 18 that the outcome of the so-called CISAC decision is limited to music.
- (4) Therefore, AGICOA does not fall under the category of CMOs for which "Territorial rights are the bread and butter" – see FN 50 of the EU Reflection paper.
- (5) IPTV is here defined as a system where digital television is delivered to a defined user group using Internet Protocol over a secure closed network infrastructure via broadband connection.