

Consultation response submitted by AGICOA – *Public service content in a connected society: Ofcom’s third review of public service broadcasting*

About Agicoa

AGICOA (Association for the International Collective Management of Audiovisual Works), is an international, not-for-profit organization established thirty years ago in Geneva to represent worldwide, collect and distribute royalties to independent producers of audiovisual works. We represent more than one million audiovisual works and more than 15.000 rights holders, including UK audiovisual producers and distributors and foreign audiovisual producers and distributors whose works are broadcast in the UK. We operate in numerous countries all over the world through [the AGICOA Alliance](#), a network of not-for-profit organizations and professional associations working on behalf of independent producers.

AGICOA is an observer member of WIPO and its Standing Committee for Copyright and Related Rights and a founding member of WIPO’s TAG for Excellency Initiative aiming at establishing high level standards for transparency and efficiency of collective management. We also cooperate with the European Commission in awareness initiatives related with collective management of copyright.

AGICOA licenses the exclusive rights of retransmission and communication to the public required for distribution platforms (including cable and satellite operators) to make use of audiovisual works contained in retransmissions of linear broadcast channels. AGICOA is mandated by its rights holders to authorize or prohibit the use of their exclusive rights and collect remuneration arising thereof, under the legal framework established in the Berne Convention and in Directive 93/83/EEC, as well as in national legislations implementing the provisions arising thereof. Through a coalition of member and partner organizations, AGICOA is active in licensing said rights in the majority of EU Member States.

Consultation response

Scope

AGICOA shall limit its response to the issues related with retransmission fees, in accordance with the mandate conferred to us to defend the rights owners we represent.

Position

We note that the issue of retransmission fees is raised under the chapter addressing additional sources of funding, as possible means to increase the direct funding available to PSBs. We would like to highlight that in our view the issue of retransmission fees, and in particular the exemption of all content broadcasted in PSBs' channels provided under section 73 of the Copyright, Designs and Patents Act 1988 (hereinafter Copyright Act), should be subject to a broader debate.

It is indisputable that Directive 2001/29/EC establishes a high level of protection of copyright, and that such high level of protection has been consistently confirmed in the interpretation of European Copyright Law in the different cases submitted to the Court of Justice of the European Union (CJEU). The exclusive rights that arise under national legislations transposing the Directive requires this high level of protection and also requires that rights holders must be adequately remunerated for the use of their works, as far as the exclusive rights include an economical component that must not be ignored.

In the Judgement of the CJEU of 7th March 2013, in Case C-607/11, also known as the "Catch Up Case", the Court once again stated this principle. In its follow-up judgement, the United Kingdom's High Court of Justice has very clearly stated that the exemption contained in section 73 of the Copyright Act (as far as it allows cable operators to retransmit and communicate to the public the audiovisual works broadcasted in UK PSBs' channels without obtaining permission from the broadcasters or any other copyright owners) is incompatible with Directive 2001/29. In fact, this Directive establishes a limited number of exceptions and limitations to the communication to the public right; an exception as broad as the one contemplated in section 73 of the Copyright Act is not permitted or justified. Moreover, the Directive 93/83/EEC does not contemplate any exception of any sort. Hence the exception contained in section 73 of the Copyright Act is not compatible with European Copyright Law, nor with any provision of the Bern Convention or any other relevant international treaties.

The exception contained in section 73 of the Copyright Act is presumably motivated by reasons related with UK's national broadcasting policy. We would like to note that the exception gives an unfair advantage to the cable distribution sector.

It should not be ignored that all uses and in particular commercial exploitations of copyright protected works by any parties other than the legitimate rights holders require authorization and adequate payment: this is a principle established in international and European Law, but also a foundation of creative industries, in particular the audiovisual industry.

To the extent that section 73 eliminates the exclusive rights of retransmission and communication to the public of rights holders, including audiovisual producers, whenever their works are retransmitted in a UK PSB channel, it constitutes a violation of the *acquis communautaire* on copyright, namely of Directive 93/83/EEC, Directive 2001/29/EC and of the Berne Convention to which the UK is a party. Hence it introduces discrimination and violation of reciprocity in particular whenever the content broadcast and retransmitted is owned by producers that are not nationals from the UK. While arguments of national public policy may be relied upon to deprive national rights holders of their rights (and in our view it continues to fall foul, since they should not be deprived of their exclusive copyrights), such arguments cannot, in any case, be relied upon to deprive international rights holders, originating from several countries around the world thus protected by the Bern Convention and in particular from the European Union, of their rights. The Directive 2001/29/EC is to be adopted and applied on a non-discriminatory basis in all Member States.

Considering the above, we kindly invite you to consider the debate of retransmission fees not solely as a domestic question, limited to alternative ways of funding PSBs, but instead as a matter of compliance with European Law. This should be debated in a broader context, to assure recognition that the exclusive right of communication to the public, and in particular the retransmission right used by cable operators, must be fully and correctly implemented in UK's national law. As a consequence, rights holders (whether UK, EU or from other parts of the world) should be entitled to exercise their exclusive right of communication to the public whenever the audiovisual works that they create and finance are broadcast and retransmitted and should without exception be entitled to the retransmission fees due for the use of their exclusive rights.

We are aware and fully supportive of the efforts made by European authorities to require compliance of the copyright protection established in Directive 2001/29/EC in all Member States and also in the UK. In the final analysis, these provisions were agreed by all of the

Member States at the time and proper implementation is a legitimate expectation of not just the Commission but also rights holders. We urge the Government of the United Kingdom to voluntarily comply with the obligations assumed under international treaties, including the Berne Convention.

We would like to convey that the communication to the public right is licensed by our members and partners in all EU Member States whenever audiovisual works are retransmitted. Thus we regard with concern that, under Section 73, rights holders are not adequately remunerated or entitled to exercise their exclusive rights when their works are retransmitted on a UK PSBs' channel.

We would therefore respectfully request the UK to establish full protection for exclusive rights to authorize or prohibit retransmission of audiovisual works in the UK irrespective of the channel in which they are programmed and also provide for an adequate level of remuneration for affected rights holders.

We thank you for your consideration in reading our comments and remain available for any further information you may require.

Kind regards,



Chris Marcich

President