

Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 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, and amending Council Directive 93/83/EEC (Text with EEA relevance)

DIRECTIVE (EU) 2019/789 OF THE EUROPEAN  
PARLIAMENT AND OF THE COUNCIL

of 17 April 2019

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, and amending Council Directive 93/83/EEC

(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 53(1) and Article 62 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<sup>(1)</sup>,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure<sup>(2)</sup>,

Whereas:

- (1) In order to contribute to the proper functioning of the internal market, it is necessary to provide for wider dissemination in Member States of television and radio programmes that originate in other Member States, for the benefit of users across the Union, by facilitating the licensing of copyright and related rights in works and other protected subject matter contained in broadcasts of certain types of television and radio programmes. Television and radio programmes are important means of promoting cultural and linguistic diversity and social cohesion, and of increasing access to information.
- (2) The development of digital technologies and the 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, through 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 such broadcasts, such as simulcasting and catch-up services. Operators

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of retransmission services, which aggregate broadcasts of television and radio programmes into packages and provide them to users simultaneously with the initial transmission of those broadcasts, unaltered and unabridged, use various techniques of retransmission, such as cable, satellite, digital terrestrial, and mobile or closed circuit IP-based networks, as well as the open internet. Furthermore, operators that distribute television and radio programmes to users have different ways of obtaining the programme-carrying signals of broadcasting organisations, including by means of direct injection. There is a growing demand, on the part of users, for access to broadcasts of television and radio programmes not only originating in their Member State, but also in other Member States. Such users include members of linguistic minorities in the Union, as well as persons who live in a Member State other than their Member State of origin.

- (3) Broadcasting organisations transmit daily many hours of television and radio programmes. Those programmes incorporate a variety of content, such as audiovisual, musical, literary or graphic works, protected under Union law by copyright or related rights or both. That results in a complex process of clearing the rights of a multitude of rightholders, and for various 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 programmes. 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 clearance of such rights.
- (4) Operators of retransmission services typically offer multiple programmes comprising a multitude of works and other protected subject matter and have a very short time frame for obtaining the necessary licences and, hence, face a significant rights clearance burden. Authors, producers and other rightholders also risk having their works and other protected subject matter used without authorisation or payment of appropriate remuneration. Such remuneration for the retransmission of their works and other protected subject matter is important to ensure that there is a diverse content offer, which is also in the interest of consumers.
- (5) The rights in works and other protected subject matter are harmonised, inter alia, through Directive 2001/29/EC of the European Parliament and of the Council<sup>(3)</sup> and Directive 2006/115/EC of the European Parliament and of the Council<sup>(4)</sup>, which provide for a high level of protection for rightholders.
- (6) Council Directive 93/83/EEC<sup>(5)</sup> facilitates cross-border satellite broadcasting and retransmission by cable of television and radio programmes from other Member States. 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 broadcasts. Furthermore, 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 cover retransmissions by means of other technologies.
- (7) Accordingly, cross-border provision of online services that are ancillary to broadcasts, and retransmissions of television and radio programmes originating in other Member

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States, should be facilitated by adapting the legal framework on the exercise of copyright and related rights relevant for those activities. That adaptation should be done by taking account of the financing and production of creative content, and, in particular, of audiovisual works.

- (8) This Directive should cover ancillary online services offered by a broadcasting organisation, which have a clear and subordinate relationship with the broadcasting organisation's broadcasts. Those services include services that give access to television and radio programmes in a strictly linear manner, simultaneously to the broadcast, and services that give 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, the ancillary online services covered by this Directive include services that give access to material that 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. This Directive should apply to ancillary online services that are provided to users by broadcasting organisations together with the broadcasting service. It should also apply to ancillary online services that, while having a clear and subordinate relationship with the broadcast, can be accessed by users separately from the broadcasting service without there being a precondition for the users to have to obtain access to that broadcasting service, for example via a subscription. This does not affect the freedom of broadcasting organisations to offer such ancillary online services free of charge or against payment. The provision of access to individual works or other protected subject matter that have been incorporated in a television or radio programme, or to works or other protected subject matter that are not related to any programme broadcast by the broadcasting organisation, such as services giving access to individual musical or audiovisual works, music albums or videos, for example video-on-demand services, should not fall within the scope of the services covered by this Directive.
- (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 that occur in the course of the provision of, the access to or the use of an ancillary online service. That principle should cover the clearance of all rights that are necessary for a broadcasting organisation to be able to communicate to the public or make available to the public its programmes when providing ancillary online services, including the clearance of any copyright and related rights in the works or other protected subject matter used in the programmes, for example the rights in phonograms or performances. That country of origin principle should apply exclusively to the relationship between rightholders, or entities representing rightholders, 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 country of origin principle should not apply to any subsequent communication to the public of works or other protected subject matter, by wire or wireless means, or to any subsequent making available to the public of works or other protected subject

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matter, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them, or to any subsequent reproduction of the works or other protected subject matter which are contained in the ancillary online service.

- (10) Given the specificities of the financing and licensing mechanisms for certain audiovisual works, which are often based on exclusive territorial licensing, it is appropriate, as regards television programmes, to limit the scope of application of the country of origin principle set out in this Directive to certain types of programmes. Those types of programmes should include news and current affairs programmes as well as a broadcasting organisation's own productions which are exclusively financed by it, including where the funds for the financing used by the broadcasting organisation for its productions come from public funds. For the purposes of this Directive, broadcasting organisations' own productions should be understood as covering productions carried out by a broadcasting organisation with the use of its own resources, but excluding productions commissioned by the broadcasting organisation to producers that are independent from the broadcasting organisation and co-productions. For the same reasons, the country of origin principle should not apply to television broadcasts of sports events under this Directive. The country of origin principle should apply only when programmes are used by the broadcasting organisation in its own ancillary online services. It should not apply to the licensing of a broadcasting organisation's own productions to third parties, including to other broadcasting organisations. The country of origin principle should not affect the freedom of rightholders and broadcasting organisations to agree, in compliance with Union law, on limitations, including territorial limitations, to the exploitation of their rights.
- (11) The country of origin principle set out in this Directive should not result in any obligation for broadcasting organisations to communicate or make available to the public programmes in their ancillary online services, or to provide such ancillary online services in a Member State other than the Member State of their principal establishment.
- (12) Since the provision of, the access to or the use of an ancillary online service is, under this Directive, 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 setting the amount of the payment to be made for the rights in question, the parties take into account all aspects of the ancillary online service, such as the features of the service, including the duration of the online availability of programmes included in 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 versions provided. It should nevertheless remain possible to use specific methods for calculating the amount of payment for the rights subject to the country of origin principle, such as methods based on the revenues of the broadcasting organisation generated by the online service, which are used, in particular, by radio broadcasting organisations.

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- (13) On account of the principle of contractual freedom, it will remain possible to limit the exploitation of the rights affected by the country of origin principle set out in this Directive, provided that any such limitation is in compliance with Union law.
- (14) Operators of retransmission services can use different technologies 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. The programme-carrying signals can be obtained by operators of retransmission services from broadcasting organisations, which themselves transmit those signals to the public, in different ways, for example by capturing the signals transmitted by the broadcasting organisations or receiving the signals directly from them through the technical process of direct injection. Such operators' services can be offered on satellite, digital terrestrial, mobile or closed circuit IP-based and similar networks or through internet access services as defined in Regulation (EU) 2015/2120 of the European Parliament and of the Council<sup>(6)</sup>. Operators of retransmission services using such technologies for their retransmissions should therefore be covered by this Directive and benefit from the mechanism that introduces mandatory collective management of rights. In order to ensure that there are sufficient safeguards against the unauthorised use of works and other protected subject matter, which is particularly important in the case of services that are paid for, retransmission services which are offered through internet access services should be included in the scope of this Directive only where those retransmission services are provided in an environment in which only authorised users can access the retransmissions and the level of content security provided is comparable to the level of security for content transmitted over managed networks, such as cable or closed circuit IP-based networks, in which content that is retransmitted is encrypted. Those requirements should be feasible and adequate.
- (15) To retransmit initial transmissions of television and radio programmes, operators of retransmission services have to obtain an authorisation from the holders of the exclusive right of communication to the public of works or other protected subject matter. In order to provide legal certainty to the operators of retransmission services 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 under 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. Under those rules, the right to grant or refuse authorisation as such remains intact, and only the exercise of that right is regulated to some extent. Rightholders should receive appropriate remuneration for the retransmission of their works and other protected subject matter. When determining reasonable licensing terms, including the license fee, for a retransmission in accordance with Directive 2014/26/EU of the European Parliament and of the Council<sup>(7)</sup>, the economic value of the use of the rights in trade, including the value allocated to the means of retransmission, should, inter alia, be taken into account. This should be without prejudice to the collective exercise of the right to payment of a single equitable remuneration for performers and phonogram producers for the communication to the public of commercial phonograms as provided for in Article 8(2) of Directive 2006/115/EC, and to Directive 2014/26/

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EU, in particular its provisions concerning the rights of rightholders with regard to the choice of a collective management organisation.

- (16) This Directive should allow agreements concluded between a collective management organisation and operators of retransmission services for rights that are subject to mandatory collective management under this Directive to be extended to apply to the rights of rightholders who are not represented by that collective management organisation, without those rightholders being allowed to exclude their works or other subject matter from the application of that mechanism. In cases where there is more than one collective management organisation that manages the rights of the relevant category for its territory, it should be for the Member State, in respect of the territory of which the operator of a retransmission service seeks to clear the rights for a retransmission, to determine which collective management organisation or organisations have the right to grant or refuse the authorisation for a retransmission.
- (17) Any rights held by broadcasting organisations themselves in respect of their broadcasts, including rights in the content of programmes, should not be subject to 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. Accordingly, it is comparatively simple for those operators to clear the rights with broadcasting organisations. As a consequence, to obtain the necessary licences from broadcasting organisations, operators of retransmission services do not face the same burden as they face when seeking to obtain licences from holders of rights in works and other protected subject matter included in the television and radio programmes they retransmit. Therefore, there is no need for simplification of the licensing process with regard to rights held by broadcasting organisations. It is, however, necessary to ensure that where broadcasting organisations and operators of retransmission services enter into negotiations, they negotiate in good faith regarding the licensing of rights for the retransmissions covered by this Directive. Directive 2014/26/EU provides for similar rules applicable to collective management organisations.
- (18) The rules provided for in this Directive concerning the rights in retransmission exercised by broadcasting organisations in respect of their own transmissions should not limit the choice of rightholders to transfer their rights either to a broadcasting organisation or to a collective management organisation, thereby allowing them to have a direct share in the remuneration paid by the operator of a retransmission service.
- (19) Member States should be able to apply the rules on retransmission established in this Directive and in Directive 93/83/EEC to situations where both the initial transmission and the retransmission take place within their territory.
- (20) In order to ensure that there is legal certainty and to maintain a high level of protection for rightholders, it is appropriate to provide that when broadcasting organisations transmit their programme-carrying signals by direct injection only to signal distributors without directly transmitting their programmes to the public, and the signal distributors send those programme-carrying signals to their users to allow

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them to watch or listen to the programmes, only one single act of communication to the public is deemed to occur in which both the broadcasting organisations and the signal distributors participate with their respective contributions. The broadcasting organisations and the signal distributors should therefore obtain authorisation from the rightholders for their specific contribution to the single act of communication to the public. Participation of a broadcasting organisation and a signal distributor in that single act of communication to the public should not give rise to joint liability on the part of the broadcasting organisation and the signal distributor for that act of communication to the public. Member States should remain free to provide at national level for the arrangements for obtaining authorisation for such a single act of communication to the public, including the relevant payments to be made to the rightholders concerned, taking into account the respective exploitation of the works and other protected subject matter, by the broadcasting organisation and signal distributor, related to the single act of communication to the public. Signal distributors face, in a similar manner to operators of retransmission services, a significant burden for rights clearance, except as regards rights held by broadcasting organisations. Member States should therefore be allowed to provide that signal distributors benefit from a mechanism of mandatory collective management of rights for their transmissions in the same way and to the same extent as operators of retransmission services for retransmissions covered by Directive 93/83/EEC and this Directive. Where signal distributors merely provide broadcasting organisations with ‘technical means’, within the meaning of the case-law of the Court of Justice of the European Union, to ensure that the broadcast is received or to improve the reception of that broadcast, the signal distributors should not be considered to be participating in an act of communication to the public.

- (21) When broadcasting organisations transmit their programme-carrying signals directly to the public, thereby carrying out an initial act of transmission, and also simultaneously transmit those signals to other organisations through the technical process of direct injection, for example to ensure the quality of the signals for retransmission purposes, the transmissions by those other organisations constitute a separate act of communication to the public from the one carried out by the broadcasting organisation. In those situations, the rules on retransmissions laid down in this Directive and in Directive 93/83/EEC, as amended by this Directive, should apply.
- (22) To ensure the efficient collective management of rights and the accurate distribution of revenues collected under the mandatory collective management mechanism introduced by this Directive, it is important that collective management organisations maintain proper records of membership, licences and the use of works and other protected subject matter, in accordance with the transparency obligations set out in Directive 2014/26/EU.
- (23) 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 that service, it is necessary to apply the country of origin principle also to existing agreements, but with a transitional period. During that transitional period, the principle should not apply to those existing agreements, thus providing time to adapt them, where necessary, in accordance with this Directive.

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It is also necessary to provide for a transitional period in order to allow broadcasting organisations, signal distributors and rightholders to adapt to the new rules on the exploitation of works and other protected subject matter through direct injection set out in the provisions in this Directive on transmission of programmes through direct injection.

- (24) In line with the principles of better regulation, a review of this Directive, including its provisions on direct injection, should be undertaken after a certain period of time of this Directive being in force, in order to assess, inter alia, its benefits for Union consumers, its impact on the creative industries in the Union, and on the level of investment in new content, and hence also the benefits regarding improved cultural diversity in the Union.
- (25) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. While this Directive may result in an interference with the exercise of the rights of rightholders, insofar as mandatory collective management takes place for the exercise of the right of communication to the public with regard to retransmission services, it is necessary to prescribe the application of mandatory collective management in a targeted manner and to limit it to specific services.
- (26) Since the objectives of this Directive, namely promoting the cross-border provision of ancillary online services for certain types of programmes and facilitating retransmissions of television and radio programmes originating in other Member States, cannot be sufficiently achieved by Member States but can rather, 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 Directive does not go beyond what is necessary in order to achieve those objectives. As concerns the cross-border provision of ancillary online services, this Directive does not oblige broadcasting organisations to provide such services across borders. Neither does this Directive oblige operators of retransmission services to include in their services television or radio programmes originating in other Member States. This Directive 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 with regard to television and radio programmes originating in other Member States.
- (27) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents<sup>(8)</sup>, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

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- (1) [OJ C 125, 21.4.2017, p. 27.](#)
- (2) Position of the European Parliament of 28 March 2019 (not yet published in the Official Journal) and decision of the Council of 15 April 2019.
- (3) 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.](#))
- (4) 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.](#))
- (5) 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.](#))
- (6) 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.](#))
- (7) 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.](#))
- (8) [OJ C 369, 17.12.2011, p. 14.](#)