

Andrzej Matlak

Regulations on the Broadcasting and Retransmission of Works via Digital Distribution Channels Under Directive (EU) 2019/789 (SatCab II)

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The development of digital technology means that currently more and more audience have access to radio and television programmes via various kinds of electronic communications networks. This includes using such programmes both during the actual broadcasting and on demand, via traditional channels, such as satellite transmission or cable network, as well as by means of online services. Authorities of the European Union have in recent years identified growing demand for access to programmes not only from the audience's country of residence, but also from other EU Member States. This trend has also been noticed by broadcasters which themselves create the content of their programmes and by operators which retransmit other parties' programmes. Therefore, broadcasting organizations, apart from transmitting their own programmes, more and more often offer ancillary online services connected with transmission, such as simulcasting or catch-up services. On the other hand, as for retransmission, operators which aggregate broadcasts of television and radio programmes into packages, provide them to users not only using cable networks, but also satellite, digital terrestrial, and mobile or closed IP-based networks (e.g., via the Internet). Having regard to the above, EU authorities adopted Directive 2019/789 (SatCab II Directive), which aims mainly to facilitate cross-border use of radio and television programmes in digital versions across the European Union. The article¹ discusses the norms resulting from this Directive concerning: ancillary online services provided by broadcasting organizations (including the country-of-origin principle), retransmission of television and radio programmes, as well as transmission of programmes by means of the so-called 'direct injection' into the distribution network. Attention is drawn to certain doubts concerning the interpretation of Article 3(1) and Article 8 of the Directive, and to the need to remove such doubts in the implementation of the directive into national laws of the Member States.

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1. Introduction

In 2019, two directives of major importance from the perspective of copyright law – Directives (EU) 2019/789² and 2019/790³ – were adopted. While the latter (Directive on copyright and related rights in the Digital Single Market) has already been the subject of extensive commentary in international legal scholarship, the SatCab II Directive has not attracted significant interest, as evidenced by the limited number of rather general publications about its provisions. Meanwhile, Directive (EU) 2019/789 is of particular significance in the context of the broadcasting and retransmission of works via digital distribution channels.

The Communication of the European Commission of 6 May 2015, entitled *A Digital Single Market Strategy for Europe*⁴ and aimed, among other things, at creating an internal market for digital content and services, already emphasized to need to ensure that users⁵ across the Union have broader online access to television and radio programmes. This concerned, above all, two fundamental forms of using such transmissions—broadcasting and retransmission—both of which have increasingly been used on the Internet in recent years. The EU institutions also considered it desirable to promote the cross-border provision of ancillary online services (linked to broadcasts) and to facilitate digital retransmission of radio and television programmes originating from different Member States, recognizing the benefits that these forms of dissemination bring to users. As a consequence of implementing the above-mentioned strategy, a draft regulation laying down rules for the exercise of copyright and related rights applicable to certain online transmissions by broadcasting organizations and to the retransmission of television and radio programmes was prepared in 2016.⁶

As noted in the explanatory memorandum to that document, the regulation was proposed to ensure consistently application and direct effect of the regulation across the relevant area.⁷ Recital 17 of the draft Regulation specified that the EU legislature had

² 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; OJ L 130/82, 17.5.2019 — hereinafter ‘Directive 2019/789’ or the ‘SatCab II Directive’.

³ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC; OJ L 130/92, 17.5.2019.

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘A Digital Single Market Strategy for Europe’ of 6 May 2015, COM(2015) 192 final.

⁵ By this term, I refer to individual end-users who access television or radio programmes made available through various technical means (e.g., via satellite transmission or electronic communications networks, primarily the Internet).

⁶ Draft 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 to the retransmission of television and radio programmes of 14 September 2016, 2016/0284 (COD) — hereinafter the ‘draft Regulation’.

⁷ The Regulation was intended to be directly applicable in all EU Member States. For a more detailed discussion, see Andrzej Matlak, *Projekt unijnego rozporządzenia dotyczącego nadawania oraz reemisji programów radiowych i telewizyjnych z wykorzystaniem cyfrowych kanałów dystrybucyjnych* [Draft EU Regulation on

deliberately chosen this type of act, noting that a regulation — being directly applicable — reduces legal fragmentation and provides greater uniformity through harmonized rules that facilitate the free movement of television and radio programmes originating in other Member States. Therefore, in striving to achieve the objective of promoting the cross-border provision of the online services at issue, a regulation was regarded as the most appropriate instrument to guarantee that its rules would be applied uniformly across all EU countries and would enter into force at the same time.⁸ The intention was that, once adopted, the regulation would subject broadcasters and operators engaged in retransmission to the same rules throughout the territory of the Union. Its uniform application was expected to enhance the effectiveness of the proposed provisions and to increase the legal certainty of entities using the subject matter protected by copyright and related rights.⁹

Ultimately, following extensive discussions, the EU institutions changed their approach and, on 17 April 2019, adopted a directive on the same subject matter (Directive (EU) 2019/789).¹⁰ Its aim is, among other things, to complement Directive 93/83/EEC¹¹, as it provides for the extension of rules that govern the broadcasting of certain transmissions and the retransmission of programmes, including via satellite, mobile network systems, and closed Internet-based systems using the IP protocol.

Compared to the draft Regulation, two major differences in the scope of the SatCab II Directive can be identified.¹² First, the application of the country-of-origin principle in relation to ancillary online services has been significantly limited. In Directive (EU) 2019/789, it applies only to certain television broadcasts (Article 3), therefore the scope of its application is considerably narrower than under the draft Regulation. The Commission's original proposal met with strong opposition from representatives of the audiovisual sector, who successfully persuaded the Council and Parliament to adopt their proposals.¹³

the broadcasting and retransmission of radio and television programmes via digital distribution channels], in *Qui bene dubitat, bene sciet: Księga jubileuszowa dedykowana Profesorowi Ewie Nowińskiej* [*Qui bene dubitat, bene sciet: A Jubilee Book for Professor Ewa Nowińska*], 375–391 (Ryszard Markiewicz *et al.* eds., Wolters Kluwer 2018).

⁸ This approach adopted by the EU institutions has been assessed differently in the scholarly literature — see Matlak, *supra* n. 7, 375 *et seq.*; for a critical view of the draft Regulation, see Reto M. Hilty, Moritz Sutterer, *Intra-European Content Circulation*, in *Modernisation of the EU Copyright Rule. Position Statement of the Max Planck Institute for Innovation and Competition*, Max Planck Institute for Innovation and Competition Research Paper No. 17-12, 119–120 (Reto M. Hilty, Valentina Moscon eds., Max Planck Institute for Innovation and Competition 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036787.

⁹ A similar justification formed the basis for the adoption of Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, OJ L 168/1, 30.6.2017.

¹⁰ Cf. Katarzyna Klafkowska-Waśniowska, in *System Prawa Unii Europejskiej*, vol. 13. *Prawo autorskie* [European Union Legal System. Vol. 13. Copyright Law], 63 (Andrzej Matlak ed., CH BECK 2025).

¹¹ This directive also introduces minor amendments to the 1993 Satellite and Cable Directive (Directive 93/83/EEC).

¹² Andrzej Matlak, *Nowe zasady dotyczące nadawania oraz reemisji programów radiowych i telewizyjnych z wykorzystaniem cyfrowych kanałów dystrybucyjnych wynikające z dyrektywy 2019/789* [New rules on the broadcasting and retransmission of radio and television programmes using digital distribution channels arising from Directive 2019/789], 148 ZNUJ PPWI, 108 *et seq.* (2020).

¹³ See Christian Auinger, *Ein „besserer grenzüberschreitender Zugang zu Online-Inhalten“: Regulierungsherausforderungen und – antworten auf EU-Ebene*, 7 Zeitschrift für Urheber- und Medienrecht, 538 (2019).

Second, the SatCab II Directive also covers the transmission of programmes by means of direct injection¹⁴ into a distribution chain (Article 8), which was not envisaged in the draft Regulation.¹⁵

The recitals of Directive (EU) 2019/789 emphasize that an increasing number of users wish to have access to radio and television programmes both during their real-time broadcasting and on demand, whether through traditional channels, such as satellite transmission or cable network, or through online services. There is also a growing demand for access to programmes originating not only from the audience's country of residence but also from other EU Member States. This interest is particularly noticeable among linguistic minorities in the EU and among persons residing in a Member State other than their country of origin.¹⁶

The public demand mentioned above has been recognized both by broadcasters which shape the content of their own programmes, and by operators engaged in the retransmission of third-party programmes. Consequently, broadcasting organizations, in addition to broadcasting their own programmes, are increasingly offering ancillary online services related to their broadcasts, such as simulcasting or catch-up services.¹⁷

As regards retransmission¹⁸, operators who assemble third-party radio and television programmes into packages now provide them to users not only via cable networks, but also via satellite transmission, digital terrestrial transmission, transmission in closed network systems based on the IP protocol, mobile networks, and what is commonly referred to as open Internet.¹⁹

However, the above-mentioned forms of exploiting entire radio and television programmes, as well as the works contained therein, give rise to various copyright-related issues that disrupt the free movement of such transmissions within the European Union. These issues are linked, among other things, to the fact that they often involve simultaneous use of protected intellectual property across the territories of various Member States. The complex nature of the disseminated transmissions also presents difficulties. Notably, broadcasting organizations transmit their programmes on a daily basis (for many hours), and these programmes contain diverse content—such as audiovisual, musical or literary works, as well as phonograms and videograms – which are protected under EU law by copyright and related rights. This entails a complex process of verifying rights

¹⁴ In light of the definition in Article 2(4) of Directive 2019/789, 'direct injection' means 'a technical process by which a broadcasting organisation transmits its programme-carrying signals to an organisation other than a broadcasting organisation in such a way that the programme-carrying signals are not accessible to the public during that transmission'.

¹⁵ Cf. Ted Shapiro, Collette Rawnsley, *Comments on the EU's update of the "SatCab" Directive: a brave new digital world for the audiovisual sector?*, 30(5) Entertainment Law Review, 149 *et seq.* (2019).

¹⁶ See recital 2 of Directive 2019/789.

¹⁷ Cf. recital 2 of Directive 2019/789.

¹⁸ This refers to the simultaneous and unaltered dissemination (together with the initial transmission) of 'third-party' programmes, i.e., those created by broadcasting organizations.

¹⁹ In the latter case, this concerns the retransmission of third-party radio and television programmes via websites that are not linked to a specific technical infrastructure capable of ensuring a managed environment, in contrast to, for example, cable networks or closed network systems based on the IP protocol. Therefore, retransmission services offered over the open Internet have essentially been excluded from the scope of Directive 2019/789, as they possess different characteristics — cf. recital 14 of the Directive.

held by multiple rightholders concerning various categories of works and other subject matter. It often happens that rights must be verified within a short timeframe, particularly when producing news or current affairs programmes.²⁰

If broadcasters wish to make their online services available abroad, they should, in principle, hold the rights to the works and other subject matter required in all territories concerned by such communication to the public. This, in turn, makes rights clearance even more complicated.²¹

Operators engaged in the retransmission of third-party programmes face similar challenges, as they have very limited time to obtain the necessary licences for the use of works and subject matter of related rights contained in the retransmitted programmes.²² In practice, given the large number of programmes such operators retransmit, they do not even have a real possibility to verify which specific intellectual property is included in foreign radio and television programmes. It should be recalled that they have no influence whatsoever on the content of programmes compiled by individual broadcasters; the operators merely carry out their simultaneous and unaltered retransmission. Moreover, they have no possibility to determine in advance²³ who currently holds copyright and related rights in a given subject matter, especially since rightholders may come from many countries across the world. In such circumstances, it is practically unfeasible that operators could, prior to retransmission, contact all rightholders, conduct negotiations, and conclude relevant agreements for the retransmission of each work and subject matter of related rights included in the programmes of foreign broadcasters.²⁴

In view of the above-mentioned problems, the EU institutions considered that it would be beneficial for the internal market as a whole to partially eliminate these obstacles.²⁵ Accordingly, the SatCab II Directive aims to facilitate the broader, cross-border dissemination of radio and television programmes originating from different Member States. According to the EU institutions, this solution will benefit users, broadcasters, and operators across the European Union, as television and radio programmes constitute an important tool for promoting cultural and linguistic diversity, social cohesion, and access to information.²⁶

In light of the above, the legislative act in question was intended to facilitate licensing for the use of works and subject matter of related rights used in programmes made available online by broadcasters and by operators engaged in their retransmission. At present, many radio and television programmes can be received by users in other Member States via satellite, yet online access to them is often limited or not possible at all.

²⁰ Cf. recital 3 of Directive 2019/789.

²¹ Cf. recital 3 of Directive 2019/789.

²² Matlak, *supra* n. 12, 111 *et seq.*

²³ That is, prior to carrying out the retransmission of a specific programme containing particular works and subject matter protected by related rights.

²⁴ Operators disseminate, on a daily basis, several dozen (and sometimes even several hundred) programmes from various broadcasters, simultaneously and without alteration — Matlak, *supra* n. 7, 377 *et seq.*

²⁵ Cf. recital 1 of Directive 2019/789.

²⁶ It should, of course, be noted that Directive 2019/789 represents only part of the broader legislative efforts pursued by the EU institutions under the Digital Single Market Strategy; cf., for example, Bernd Justin Jütte, *Reconstructing European Copyright Law for the Digital Single Market*, Luxembourg Legal Studies vol. 10, 79 *et seq.* (Nomos 2017).

The model for Directive (EU) 2019/789 was undoubtedly Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and related rights applicable to satellite broadcasting and cable retransmission.²⁷ That Directive facilitates the cross-border satellite broadcasting and cable retransmission of television and radio programmes from other Member States; however, its provisions governing the broadcasting of programmes by broadcasting organizations apply solely to satellite transmissions and therefore do not cover ancillary online services linked to broadcasts. Furthermore, its rules on retransmission of programmes from other Member States are limited to the simultaneous, unaltered, and unabridged retransmission via a cable or microwave system and do not cover retransmission using other technologies. For these reasons, the EU institutions decided to prepare Directive (EU) 2019/789, which significantly extends the rules laid down in the SatCab Directive to other technical means of broadcasting and retransmitting protected subject matter, in particular via electronic communications networks.

2. Services covered by Directive 2019/789

It follows from the provisions of the SatCab II Directive that it concerns various forms of the use of works and other subject matter. The regulation therefore covers several distinct modes of exploitation. On a preliminary assessment, it may appear to refer only to broadcasting and retransmission, yet the scope of the act also includes the *making available to the public* of protected subject matter in a manner that enables members of the public to access it from a place and at a time individually chosen by them.²⁸

The recitals of the SatCab II Directive point out that the development of digital technologies and the Internet has changed the ways in which radio and television programmes are disseminated and accessed, as a significant share of the audience wishes to access them both during real-time broadcasting²⁹ and through on-demand services³⁰. Consequently, broadcasting organizations, in addition to broadcasting their own programmes, increasingly offer ancillary online services related to their broadcasts, such as simulcasting³¹ or catch-up³² services. These services constitute additional distribution channels that enable audiences to access entire radio or television programmes, or individual parts thereof, for example, via the Internet.³³ This practice is attractive both to broadcasters, as it can generate additional revenue, and to audiences (consumers), who benefit from a wider

²⁷ 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 248/15, 6.10.1993 – hereinafter the ‘SatCab Directive’.

²⁸ Matlak, *supra* n. 12, 113 *et seq.*

²⁹ Through traditional distribution channels such as terrestrial wireless transmission, satellite transmission, or by means of cable networks.

³⁰ As part of online services.

³¹ Understood here as the online broadcasting of television or radio programmes via the internet simultaneously with traditional terrestrial wireless, satellite, or cable transmission.

³² ‘Catch-up’ services consist in enabling viewers to watch, at a time of their own choosing (most often via specific Internet platforms), entire television programmes or individual broadcasts (e.g., films). The programmes are available for a specified period of time, usually from 7 to 30 days following the broadcaster’s initial transmission.

³³ For example, films, entertainment programmes, documentaries, and news broadcasts.

range of technical means enabling them to access the content they are interested in at a time that suits their needs.

On the other hand, operators that retransmit third-party programmes assemble them into packages and communicate them to the public in an integral manner and simultaneously with the original broadcast.³⁴ Such operators rely on various retransmission technologies, such as digital terrestrial transmission, satellite transmission, cable transmission via cable networks, transmission in closed network systems based on the IP protocol, telecommunications links (mobile networks), and open Internet.³⁵

Furthermore, there is a growing demand among audiences for access to programmes originating not only from their home country but also from other Member States of the European Union. Members of linguistic minorities and individuals residing in a Member State other than their country of origin are also interested in such access.

The SatCab II Directive therefore aims to establish a legal framework that adapts copyright rules (applicable across the EU) to the above-mentioned market conditions. The EU legislature notes that broadcasters disseminate their programmes for many hours every day, including news, entertainment, documentary, cultural or political content. These programmes, in turn, comprise diverse forms of intellectual property (e.g., works, performances, phonograms, videograms) protected by copyright or related rights. Therefore, before assembling and subsequently disseminating their programmes, broadcasters must carry out a comprehensive clearance of rights held by numerous authors, producers, and other rightholders, covering various categories of works and other protected subject matter. It often happens that these rights must be verified within a short timeframe, particularly in case of news or current affairs programmes. Furthermore, in order to make their programmes available online abroad, broadcasting organizations must, in principle, hold the rights to the works and subject matter of related rights in all the territories where their programmes will be received; hence, the comprehensive clearance becomes even more complex.

Owing to the current method of distributing various types of works, broadcasters frequently face difficulties in obtaining licences for the use of certain works across multiple countries.

The above-mentioned difficulties therefore constitute a real barrier limiting the provision of online services in respect of broadcasting and retransmission, thereby hindering the free movement of television and radio programmes within the European Union. Meanwhile, analyses carried out within the EU indicate that it is in the interest of the internal market to enable broader access to programmes originating from other Member States, as this is beneficial for users across the Union. Therefore, the EU legislature considered that this objective could be achieved by introducing rules that facilitate licensing the use of works and other protected subject matter disseminated in such programmes. It is also stressed that television and radio programmes serve as vital instruments for promoting cultural and linguistic diversity, social cohesion, and access to information.³⁶

³⁴ Cf. recital 2 of Directive 2019/789.

³⁵ This refers to publicly accessible websites (platforms) through which users may access radio or television programmes. It is irrelevant whether access to such a website is free of charge or subject to payment.

³⁶ Cf. recital 1 of Directive 2019/789.

The third area covered by Directive (EU) 2019/789 concerns the copyright status of programme transmissions by means of *direct injection*³⁷ into a distribution chain; a matter for which the draft Regulation did not contain an analogous provision.³⁸ In general terms, this concerns a technical process whereby a broadcasting organization transmits its signal (carrying the programme) to an entity other than the broadcaster in such a manner that the signal is not accessible to the public during that transmission. The recipient of the signal is typically an operator that distributes the programme to the final users.³⁹

3. Broadcasting of radio and television programmes

The first of the forms of dissemination indicated above is defined in the SatCab II Directive as an *ancillary online service*. It consists in ‘the provision to the public, by or under the control and responsibility of a broadcasting organisation, of radio or television programmes simultaneously with or for a defined period of time after their broadcast by the broadcasting organisation, as well as of any material which is ancillary to such broadcast’ (Article 2(1) of the Directive). This notion covers services that have a clear and dependent connection with the broadcast programme. Within such a service, three essential types of broadcasters’ activities can be distinguished:⁴⁰

- online communication of ‘own’ programmes simultaneously with their original broadcast;
- online communication of ‘own’ programmes with a time delay (i.e., within a defined period after their original broadcast);
- provision to recipients of additional material, produced by the broadcaster, in relation to a broadcast.

The first of the above-mentioned services (referred to as **simulcasting**) consists essentially in the linear transmission of a broadcaster’s own programmes (by a specific radio or television organization) via the Internet, with the online dissemination functioning as an additional *distribution channel* for the same programme which is available to users at the same time via traditional means of transmission (e.g. terrestrial transmitters or satellite).

The second service (referred to as **catch-up**) essentially consists in the dissemination by a given broadcaster of its radio or television programmes via the Internet, but with a certain delay relative to their original broadcast. Directive 2019/789 does not specify the duration of such delay; therefore, it appears that the EU legislature did not intend to determine this issue explicitly.⁴¹

³⁷ As defined in fn. 14.

³⁸ Cf. Shapiro, Rawnsley, *supra* n. 15, 149.

³⁹ It may be, for example, an operator of a satellite digital platform, a cable network operator, or an entity managing an internet service through which radio or television programmes of specific broadcasters are made available. This entity is generally referred to in Directive 2019/789 as a ‘signal distributor’ (see recital 20 of Directive 2019/789).

⁴⁰ Matlak, *supra* n. 12, 115-116.

⁴¹ The explanatory memorandum accompanying the proposal for the Regulation, merely clarified that ‘catch-up’ television enables consumers to watch programmes at a time of their own choosing. Generally speaking, the basis of this concept is the verification of rights to broadcast a programme within a specified period, usually from 7 to 30 days after transmission; see p. 1 of proposal 2016/0284 (COD).

The third of the above-mentioned services raises the greatest doubts. The wording used in the definition of an *ancillary online service* may evoke certain associations with audiovisual on-demand services (such as VOD). For that reason, the recitals of the SatCab II Directive clarify that the concept refers to the provision of access to materials that enrich or otherwise extend the radio or television programmes broadcast by a broadcasting organization, for example through introductions, expansions, additions, or assessments of the content of a given programme. It is emphasized that providing access to individual works or items of related rights that have been included in a programme should not be regarded as an ancillary online service. The definition likewise does not cover the provision of access to works or other protected subject matter, such individual musical or audiovisual works, music albums, or video recordings, independently of the broadcast.⁴²

The country-of-origin principle

In the European Commission's proposal for the draft Regulation, it was noted that, in the case of satellite broadcasting, the clearance of rights was facilitated by the application of the *country-of-origin principle* laid down in the SatCab Directive, under which broadcasters may clear rights only in a single Member State. Since that Directive does not apply where a broadcaster clears rights in relation to its online services, the draft Regulation envisaged a significant extension of that principle.

In Article 2(1) of the draft Regulation, the EU legislature proposed to introduce a rule whereby

[t]he acts of communication to the public and of making available occurring when providing an ancillary online service by or under the control and responsibility of a broadcasting organisation, as well as the acts of reproduction which are necessary for the provision of, the access to or the use of an ancillary online service shall, for the purposes of exercising copyright and related rights relevant for these acts, be deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment.

The cited provision introduced a legal fiction establishing that, in cross-border provision of such services, the broadcaster's exploitation of works and subject matter of related rights takes place exclusively in the EU country in which it has its principal establishment.⁴³

The Commission took the view that this approach would reduce transaction costs associated with cross-border broadcasting and thus create new opportunities for broadcasters to offer online services abroad, particularly regarding content not subject to territorial exclusivity. The proposed solution did not restrict rightholders or broadcasters in their ability to grant further licences for the exploitation of copyright and related rights

⁴² Cf. recital 8 of Directive 2019/789.

⁴³ A. Matlak, *supra* n. 12, 116-119.

in the territories of individual Member States.⁴⁴ The country-of-origin principle was not intended to apply to such additional modes of exploitation.

However, the Commission's proposal met with criticism from entities in the audiovisual production sector, which succeeded in persuading representatives of the Council and the European Parliament to accept their objections. Following trilogue negotiations between the EU institutions, the country-of-origin principle was significantly narrowed. The EU legislature noted that due to the specific mechanisms of financing and licensing of certain audiovisual works—often based on exclusive territorial licensing—it was appropriate to limit the application of the principle only to certain types of television broadcasts.⁴⁵

According to Article 3(1) of Directive (EU) 2019/789, acts of communication to the public of works or subject matter of related rights, by wire or wireless means, and acts of making such works or subject matter available, 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, with respect to:

- a) **radio programmes**; and
- b) **television programmes** that are:
 - (i) news and current affairs programmes; or
 - (ii) broadcasts of the broadcaster's own productions financed entirely by that broadcaster,

when provided as part of an ancillary online service by that organization or under its control and responsibility, as well as acts of reproduction necessary for the provision of, access to, or use of an ancillary online service (in relation to the above-mentioned programmes), are deemed, for the purposes of the exercise of copyright and related rights, to occur solely in the Member State in which the broadcasting organization has its principal establishment.

As regards television programmes, an additional restriction applies: the country-of-origin principle does not apply to the broadcasting of sports events and the works and subject matter of related rights included in such broadcasts (second subparagraph of Article 3(1) of the SatCab II Directive).

As is evident from the cited provision, radio programmes and television programmes are treated differently. For radio programmes, the country-of-origin principle is relatively broad and covers practically all transmissions they consist of. However, television programmes are subject to significant limitations. In this context, a terminological doubt arises due to discrepancies between different language versions of the SatCab II Directive. The principle was essentially limited to television programmes that are:

- news and current-affairs programmes, or
- the broadcaster's own productions financed entirely by that broadcaster.

It remains unclear whether this refers to an entire news or current-affairs *programme* (consisting of many broadcasts, including works)⁴⁶, or to **individual** news and current-affairs

⁴⁴ Cf. Thomas Dreier, *Die Schlacht ist geschlagen – ein Überblick. Zum Ergebnis des Copyright Package der EU-Kommission*, 8 Gewerblicher Rechtsschutz und Urheberrecht, 778 et seq. (2019).

⁴⁵ Cf. recital 10 of Directive 2019/789.

⁴⁶ For example, CNN, Fox News, BBC News, Sky News.

fairs *broadcasts*⁴⁷ forming part of the full programme transmitted by a broadcaster. The English version uses ‘news and current affairs programmes’, the French one ‘des programmes d’informations et d’actualités’, and the German one ‘Nachrichtensendungen und Sendungen zum aktuellen Geschehen’. Considering that the term *programme* also covers ‘the broadcaster’s own productions financed entirely by it’, it appears that the country-of-origin principle applies only to specific television broadcasts rather than entire, continuous television channels consisting of numerous works produced by various national and foreign entities.⁴⁸ Such an interpretation means that, in practice, the principle will have a very limited scope in relation to television programming, primarily covering broadcasts created by broadcasters themselves.

It must be noted that, for the purposes of the SatCab II Directive, **own productions** of broadcasting organizations mean productions made by the radio or television organization using its own resources, and do not include productions commissioned from independent producers or co-productions. In legal scholarship it is pointed out that the wording nevertheless allows the application of the country-of-origin principle to programmes produced by entities dependent on the broadcaster (e.g., an affiliated company producing audiovisual works).⁴⁹

The EU legislature also explained that the country-of-origin principle does not affect the freedom of contract enjoyed by rightsholders and broadcasting organizations, which allows them to establish—consistent with EU law—limitations on the exercise of copyright and related rights. Member States must also ensure that, when determining the remuneration payable for rights subject to the country-of-origin principle, the parties take account of all aspects of the ancillary online service (for example, its features, the period of online availability of the transmissions made accessible within the service, the number of users, and the available language versions). Remuneration may also be based, for example, on the revenues of the broadcasting organization—an approach that will typically apply where an agreement is concluded on behalf of rightsholders by a collective management organization.⁵⁰

The country-of-origin principle should apply only where transmissions are used by a broadcasting organization as part of its own ancillary online services. It does not, however, apply to the granting of licences to third parties for the broadcaster’s own productions—for example, for further communication to the public or reproduction of protected subject matter contained in disseminated television programmes or in the ancillary materials relating thereto.⁵¹

⁴⁷ For example, *Newsnight* or *Question Time* broadcast by the BBC.

⁴⁸ However, even the adoption of such an interpretation does not resolve all doubts, as the SatCab II Directive offers no clear statutory definition of the categories of programmes it refers to; cf. Renate Dörr, *Ist die Richtlinie fit für das digitale Zeitalter? Chancen und Grenzen der Online-SatCab-Richtlinie aus Rundfunksicht*, 7 Zeitschrift für Urheber- und Medienrecht, 558 (2019). On examination of the content of programmes currently disseminated by various television broadcasters, it can be observed that traditional genres of news and current affairs programmes often blend with entertainment and advisory content, particularly when targeted at younger audiences.

⁴⁹ Cf. Shapiro, Rawnsley, *supra* n. 15, 150.

⁵⁰ See Article 3(2) and (3) of Directive 2019/789.

⁵¹ See recital 10 of Directive 2019/789.

4. Retransmission of radio and television programmes

It should be noted that the Satellite and Cable Directive⁵² provides for a system of mandatory collective management of copyright and related rights in relation to cable retransmission of television and radio programmes originating in other Member States. While this system facilitates rights clearance, it does not cover retransmission services provided by means other than cable, such as via satellite or closed electronic communications networks, including IPTV (transmission of programmes in closed networks based on the IP protocol).⁵³ For this reason, Article 2(2) of Directive (EU) 2019/789 gives a relatively broad definition of *retransmission*. It is defined as the simultaneous, unaltered and unabridged retransmission, intended for the public, of an initial transmission of television or radio programmes from another Member State—other than cable retransmission as defined in the SatCab Directive—where such initial transmission is by wire or over the air, including by satellite (but is not an online transmission), provided that:

- the retransmission is carried out by a party other than the broadcasting organization that made or had control over and responsibility for the initial transmission, irrespective of the manner in which the retransmission operator obtains the signal carrying the programme from the broadcasting organization for the purpose of retransmission; and
- where the retransmission is carried out via an Internet access service as defined in Article 2, second paragraph, point (2) of Regulation (EU) 2015/2120, it is provided in a *managed environment*, understood as ‘an environment in which the operator of a retransmission service provides a secure retransmission to authorised users’.⁵⁴

The above definition focuses on three fundamental elements. First, it confirms that retransmission, from a legal perspective, may occur only when it is carried out by an entity **other than**⁵⁵ the broadcaster that originally transmitted the radio or television programme. Even if a broadcaster were, from a technical perspective, to disseminate its programme simultaneously and integrally via several distribution channels (e.g., by wire, satellite and over the Internet), it would not, in legal terms, constitute a retransmission of its own programme. Second, one can speak of retransmission only if the transmission is intended **for reception by the public**. It does not occur when a broadcaster sends its

⁵² Directive 93/83/EEC.

⁵³ Matlak, *supra* n. 12, 120–122.

⁵⁴ See Article 2(3) of Directive 2019/789.

⁵⁵ This may include, for example, an operator of a satellite platform (a so-called multiplex) or an operator providing its subscribers with access to programmes through a controlled (secured) internet service based on the IP protocol. In legal scholarship, a distinction is drawn between IPTV Internet services and OTT (over-the-top content) services. In the latter case, providers also offer users transmissions using the internet protocol (IP); however, this is essentially retransmission carried out through open Internet rather than through a closed (secured) network, since OTT service providers usually do not simultaneously provide users with Internet access. An OTT service may therefore generally be received on all devices enabling Internet use, such as laptops, smartphones, tablets, and television sets equipped with Internet modules – see Julia Niebler, *Die Online-SatCab-Richtlinie – Weitersendung 2.0?*, 7 Zeitschrift für Urheber- und Medienrecht, 546–547 (2019).

programme solely for individual reception by a specific operator (for example, a technical feed enabling the operator to verify the quality or technical parameters of the programme). Third, retransmission encompasses only the dissemination of an entire radio or television programme that is **simultaneous**⁵⁶ with the original broadcast and is carried out **without any alterations**.⁵⁷

In addition, the EU legislature clarifies that, for the purposes of retransmission, the manner in which the operator receives the signal (which carries the programme) from the broadcasting organization is irrelevant. In practice, retransmission operators may receive such a signal directly from the broadcaster, who simultaneously makes it available to the public; however, they may also capture a signal transmitted by the broadcaster in the course of the technical process of *direct injection*, such as for satellite uplink. It should be noted that in the case of Internet-based retransmission, Directive (EU) 2019/789 applies only to services provided in a *managed environment* (e.g., IPTV systems). By introducing this legal definition of ‘retransmission’, the EU legislature sought to complement the concept of ‘cable retransmission’ as defined in the SatCab Directive.

5. Exercise of rights in relation to retransmission

It is widely recognized that operators retransmitting radio and television programmes via satellite transmission, digital terrestrial transmission, closed electronic communications networks based on the IP protocol, mobile networks, and similar networks provide services that are equivalent to those offered by cable network operators. In each case, such operators receive, among other things, radio and television programmes originating from other EU Member States and subsequently make them available for reception by the public in a simultaneous, unaltered and unabridged manner in relation to the initial broadcast. Therefore, in order to ensure legal certainty for operators providing retransmission services via satellite transmission, digital terrestrial transmission, closed IP-based networks, and telecommunications networks, and to eliminate discrepancies between national laws concerning such services, the SatCab II Directive introduces rules similar to those applicable to cable retransmission (as laid down in the SatCab Directive). The intention is to extend the principle of *mandatory collective management* to operators retransmitting programmes of other broadcasters through the above-mentioned distribution channels.⁵⁸

⁵⁶ Carried out by the broadcasting organization. The retransmitted programme should be available to the operator’s subscribers at the same time as it is made available by the original broadcaster itself (a minor technical delay in retransmission compared with the original broadcast may occur in the case of satellite transmission; this concerns, for example, 3–4 seconds needed for the signal to travel from the satellite to the Earth).

⁵⁷ The content of the retransmitted programme should, in principle, be identical to the version of the programme broadcast by the radio or television organization. Therefore, the operator may not modify the broadcasts forming part of the programme or alter their order.

⁵⁸ According to the EU institutions, such an extension of the regulation does not infringe the provisions of 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, and in particular its provisions concerning the rights of rightholders with regard to the choice of a collective management organization, OJ L 84/72, 20.3.2014.

It should be clearly emphasised, however, that, like Directive 93/83/EEC, Directive 2019/789 is essentially limited to the retransmission of programmes ‘from another Member State’. Thus, retransmissions of programmes that take place solely within a single country will generally fall under the domestic law of the respective Member State. Nevertheless, Article 7 of the SatCab II Directive permits Member States to extend the special retransmission regime to include programmes that are broadcast and simultaneously retransmitted within their own territory.⁵⁹

It has been clarified that Directive 2019/789 should exclude retransmission services offered over the open Internet, as they possess distinct characteristics. These services are not linked to any specific infrastructure, and their capacity to provide a managed environment is limited compared with, for example, cable networks or closed IP-based networks, in which the retransmitted content is encrypted.⁶⁰

Under Article 4(1) of Directive 2019/789, holders of copyright and related rights (other than broadcasting organizations) may exercise their rights to authorize or prohibit retransmission exclusively through a collective management organization. By introducing a principle that generally precludes rightholders from managing their copyright and related rights on an individual basis, the EU institutions sought to establish mechanisms that would safeguard those rightholders—particularly in their relations with collective management organizations.

According to Article 4(2) of the SatCab II Directive, where a rightholder has not entrusted the management of their rights to any collective management organization, the right to authorize or refuse retransmission on behalf of that rightholder is deemed to be exercised by the collective management organization that manages rights in the same category of works within the Member State in which the operator seeks clearance or acquisition of retransmission rights. However, where more than one collective management organization manages rights in the same category of works within a Member State, that Member State must designate the organization or organizations authorized to grant or refuse retransmission licences.

EU Member States must also ensure that a rightholder who has not entrusted their rights for management enjoys the same rights and obligations under the agreement between the retransmission operator and the collective management organization(s) as those rightholders who have entrusted their rights to such organization(s).⁶¹

As made explicit in Article 5 of Directive 2019/789, mandatory collective management for retransmission should not apply to rights exercised by broadcasting organizations in respect of their own transmissions, irrespective of whether such rights are owned by that organization or have been transferred to it by other copyright or related rights holders. The EU legislature has rightly concluded that retransmission operators usually maintain ongoing commercial relations with broadcasting organizations, making it relatively

⁵⁹ Matlak, *supra* n. 12, 122-124.

⁶⁰ See recital 14 of Directive 2019/789.

⁶¹ See Article 4(3) of Directive 2019/789. Member States should also ensure that a rightholder is able to enforce their rights within a time limit laid down by the Member State concerned, which shall not be shorter than three years from the date of the retransmission that included their work or subject matter of related rights.

straightforward for operators to identify such broadcasters; therefore, in this context, rights clearance is comparatively simple. Obtaining the necessary licences from broadcasting organizations is therefore not as burdensome for operators as obtaining licences from holders of economic rights in the works and protected subject matter included in retransmitted programmes. Consequently, there is no need to simplify licensing procedures for rights held by broadcasting organizations.⁶²

It must nevertheless be borne in mind that introducing the mechanism of mandatory collective management in the field of retransmission—analogous to those in the SatCab Directive—inevitably leads to conflicts between operators retransmitting works and subject matter protected by related rights and collective management organizations. This is primarily because negotiations are no longer conducted between the creator (often the weaker party) and a professional retransmission operator (who may attempt to impose its position), but instead the operator must negotiate with a collective management organization, which in many cases holds a *de facto* monopolistic position. In this context, the introduction of the construct of ‘mandatory collective management’ in relation to retransmission must be regarded as granting such organizations exceptionally strong prerogatives. Their negotiating position is substantially stronger than in other fields of exploitation, since operators are legally obliged to conclude an agreement with the relevant organization (the possibility of individual agreements between operators and rightholders whose works or subject matter are retransmitted has been excluded).⁶³ Accordingly, when adopting the SatCab Directive, the EU legislature sought to include rules that would facilitate the resolution of the inevitable disputes arising during negotiations between collective management organizations and cable operators. To this end, the SatCab Directive contains Articles 11 and 12, which require Member States to introduce rules ensuring the availability of specially appointed mediators and to ensure that negotiations are conducted without obstruction and are not broken off without valid justification. It was recognized that due to the complex nature of cable retransmission itself, disputes concerning the conclusion of such agreements do not constitute standard contractual disputes.

Analysis of EU documents demonstrates that one of the principal objectives behind establishing mandatory collective management was to create additional procedures and, where necessary, independent bodies capable of facilitating agreements between collective management organizations and cable operators, as well as preventing abuses of dominant position by collective management organizations. This was one of the key aims the EU legislature sought to achieve through the adoption of the above-mentioned directive.⁶⁴

Therefore, Article 6 of Directive 2019/789 obliges Member States to ensure that mediation by one or more mediators, in accordance with Article 11 of Directive 93/83/EEC, is available where no agreement has been concluded between a collective management organization and a retransmission operator, or between a retransmission operator and a broadcasting

⁶² See recital 17 of Directive 2019/789.

⁶³ Matlak, *supra* n. 12, 124.

⁶⁴ See recital 30 of Council Directive 93/83/EEC and the Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, COM(2002) 430 final of 26 July 2002.

organization, concerning the authorization of the retransmission of broadcast programmes. The scope of this mediation is thus relatively broad, as it should also cover disputes between broadcasting organizations and operators intending to retransmit their programmes.

6. Direct injection of the broadcasting organization's signal

The original proposal of the European Commission for the draft Regulation did not include provisions concerning the transmission of programmes by means of *direct injection*⁶⁵ into the distribution network. However, this issue was ultimately incorporated into Directive 2019/789. The justification for regulating it was the intention to ensure legal certainty and maintain a high level of protection for rightholders in situations where a broadcaster transmits its signal (carrying the programme) by means of direct injection exclusively to signal distributors (without transmitting its programmes directly to recipients), and those distributors subsequently deliver that signal to end-users enabling them to watch or listen to the programmes. In such cases, it is generally established that only a single act of communication to the public takes place, in which both the broadcasting organization and the signal distributors participate through their respective contributions.⁶⁶

Pursuant to Article 8(1) of the SatCab II Directive, where a broadcasting organization transmits a programme-carrying signal to a signal distributor by means of direct injection, but does not itself deliver that signal directly to the public, and the distributor subsequently transmits that signal to the public, the broadcaster and the signal distributor are deemed to participate in a single act of communication to the public, for which both (the broadcasting organization and the distributor) must obtain authorization from the rightholders. Broadcasting organizations and signal distributors should therefore obtain authorization from rightholders for their respective involvement in the single act of communication to the public. Participation by the broadcaster and the signal distributor in this single act should not give rise to joint liability for that communication.⁶⁷ The EU legislature thus excludes joint and several liability in this regard.⁶⁸

It is also emphasized that Member States may themselves determine the conditions for obtaining authorization from the rightholders. They may decide that Articles 4, 5 and 6 of Directive 2019/789 apply *mutatis mutandis* to the exercise by rightholders of the right to authorize or refuse authorization to signal distributors for the transmission referred to in Article 8(1), carried out via one of the technical means specified in Article 2(2) of Directive 2019/789 or in Article 1(3) of Directive 93/83/EEC. The EU legislature thus gives Member States the discretion to determine the conditions for obtaining authorization for such a single act of communication to the public, including any payments owed to specific rightholders. National legislation should take into account the extent to which works and subject matter protected by related rights are used both by the broadcaster and the signal

⁶⁵ As defined in fn. 14.

⁶⁶ Matlak, *supra* n. 12, 125-126.

⁶⁷ See recital 20 of Directive 2019/789.

⁶⁸ Cf. Janusz Piotr Kolczyński, *Direct Injection Law – A New Trans-Territorial Right or an Excessive and Unnecessary EU Copyright Law Concept*, 47(12) European Intellectual Property Review, 710-711 (2025).

distributor within that single act of communication to the public. The aim is, among other things, to eliminate the risk of double remuneration being charged by rightholders to both broadcasters and distributors for the use of the same content within the same field of exploitation.⁶⁹ It has been clarified that signal distributors (much like retransmission operators) will bear a significant burden of rights clearance, except in relation to rights held by broadcasting organizations. Member States may therefore introduce rules providing that signal distributors are subject to the mechanism of mandatory collective management in the same manner as operators engaging in the retransmission of programmes.⁷⁰

However, it has been pointed out that where signal distributors merely provide broadcasting organizations with ‘technical means’ – within the meaning of the case law of the Court of Justice of the European Union⁷¹ – in order to ensure or improve the reception of a broadcast, they should not be regarded as participating in an act of communication to the public.⁷²

A different situation arises where broadcasting organizations transmit their programme-carrying signal directly to the public, thereby performing the primary act of transmission, and simultaneously transmit that signal to other distributors via the technical process of direct injection (e.g., to ensure signal quality for retransmission purposes). In such cases, the transmissions carried out by those other distributors constitute an act of communication to the public that is distinct from the act of communication carried out by the broadcasting organization.⁷³ In such situations, the provisions on retransmission laid down in Articles 4–7 of Directive 2019/789 and the retransmission rules set out in Directive 93/83/EEC should apply.⁷⁴

7. Conclusion

The analysis presented in this article indicates that the rules arising from Directive 2019/789 raise certain doubts. It appears, however, that the majority of these doubts could have been resolved during the implementation of the SatCab II Directive into the domestic laws of the Member States. This concerns, for example, the definition of an ‘ancillary online service’ in the context of the possible application of the country-of-origin principle, as well as rational extension of the rules concerning the retransmission of works and subject matter protected by related rights. As for the methods of implementation of Directive 2019/789, the solutions adopted in Germany⁷⁵ appear particularly noteworthy – especially regarding the implementation of the country-of-origin principle, retransmission, and direct injection of a broadcaster’s signal. These provisions generally seem to fulfil the objectives laid down in the SatCab II Directive.

⁶⁹ Cf. Dörr, *supra* n. 48, 560.

⁷⁰ Cf. Auinger, *supra* n. 13, 539–540.

⁷¹ See, for example, the judgment of the Court of Justice of the European Union of 16 March 2017 in *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v. Zürs.net Betriebs GmbH*, Case C-138/16.

⁷² See recital 20 of Directive 2019/789.

⁷³ Cf. Kolczyński, *supra* n. 69, 713.

⁷⁴ See recital 21 of Directive 2019/789.

⁷⁵ See § 20b, § 20c, § 20d oraz § 87(5) Urheberrechtsgesetz.

Prof. dr hab. Andrzej Matlak

Professor of law, Intellectual Property Law Chair, Faculty of Law and Administration,
Jagiellonian University in Krakow, Poland.

ORCID: <https://orcid.org/0000-0002-4811-0407>

Abstract

Regulations on the Broadcasting and Retransmission of Works via Digital Distribution Channels Under Directive (EU) 2019/789 (SatCab II)

The development of digital technology means that currently more and more audience have access to radio and television programmes via various kinds of electronic communications networks. This includes using such programmes both during the actual broadcasting and on demand, via traditional channels, such as satellite transmission or cable network, as well as by means of online services. Authorities of the European Union have in recent years identified growing demand for access to programmes not only from the audience's country of residence, but also from other EU Member States. This trend has also been noticed by broadcasters which themselves create the content of their programmes and by operators which retransmit other parties' programmes. Therefore, broadcasting organizations, apart from transmitting their own programmes, more and more often offer ancillary online services connected with transmission, such as simulcasting or catch-up services. On the other hand, as for retransmission, operators which aggregate broadcasts of television and radio programmes into packages, provide them to users not only using cable networks, but also satellite, digital terrestrial, and mobile or closed IP-based networks (e.g. via the Internet). Having regard to the above, EU authorities adopted Directive 2019/789 (SatCab II Directive), which aims mainly to facilitate cross-border use of radio and television programmes in digital versions across the European Union. The article discusses the norms resulting from this Directive concerning: ancillary online services provided by broadcasting organizations (including the country-of-origin principle), retransmission of television and radio programmes, as well as transmission of programmes by means of the so-called 'direct injection' into the distribution network.

The analysis presented in this article indicates that the rules arising from Directive 2019/789 raise certain doubts. It appears, however, that the majority of these could have been resolved during the implementation of the SatCab II Directive into the domestic laws of the Member States. This concerns, for example, the definition of an 'ancillary online service' in the context of the possible application of the country-of-origin principle, as well as the rational extension of the rules concerning retransmission of works and subject matter protected by related rights. As for the methods of implementation of Directive 2019/789, the solutions adopted in Germany appear particularly noteworthy—especially regarding the implementation of the country-of-origin principle, retransmission, and direct injection of a broadcaster's signal. These provisions generally seem to fulfil the objectives laid down in the SatCab II Directive.

Keywords: *copyright, related rights, EU law, Directive 2019/789 (SatCab II Directive), broadcasting, retransmission, online transmission, direct injection*

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