

fieldfisher

Country of Origin

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Introduction

The European Union is undertaking a review of the 2010 Audio-Visual Media Services Directive (AVMSD). A consultation questionnaire has been published, for which responses are requested by 30 September 2015 when the public consultation closes.

One of the interesting issues addressed in the consultation questionnaire is the “*Country of Origin*” principle.

The AVMSD covers television broadcasts and on-demand services which are TV-like and for which providers have editorial responsibility (it does not apply to content hosted by intermediaries or content-sharing platforms). Under the AVMSD (and the Television Without Frontiers Directive which preceded it), the general approach is that a minimum set of regulatory requirements are to be implemented in each EU Member State in relation to television and on-demand services that fall within that Member State’s jurisdiction.

The principle is that provided a service is licensed in a Member State (which by definition means that it will have met the minimum criteria collectively set by the EU on behalf of all the Member States), then that service is licensed to be made available throughout the European Union. Each Member State is free to impose more strict regulatory requirements, but a Member State should not interfere with a service properly licensed in another Member State even though it may not meet the more stringent requirements.

Below we review some of the issues that need to be considered in the context of reviewing how the *Country of Origin* principle has operated in practice and may operate in the context of any modified AVMSD.

Services Circumventing More Stringent Requirements

Some consternation has been expressed where a service from one Member State targets consumers in another Member State where the targeted Member State has more stringent rules than the originating Member State. For example, in some EU countries particular types of advertising are prohibited entirely (in a way that goes beyond the minimum regulation of advertising required under the AVMSD). Should the targeted Member State have some say in the licensing of such a service? The EU Consultation does invite reaction to the possibility of services having to comply with some of the rules of jurisdictions where they are delivered.

Applying the general principle of the AVMSD (and the Television Without Frontiers Directive before it), the service has to be properly within the jurisdiction of the Member State which regulates it. The AVMSD states that the Member State which has jurisdiction over a service is broadly the Member State where the service has its head office and editorial decisions are taken (the AVMSD has provisions to address which jurisdiction is appropriate if these activities take place in more than one Member State) or, for satellite services that do not meet these criteria, the Member State where the service is uplinked or whose satellite capacity is used by the service. If the service is properly licensed in the Member State which has jurisdiction over it, then the targeted Member State should be satisfied as it was party to the collectively determined minimum regulatory requirements as set out in the AVMSD.

If there remains a concern, then the Member State in question should consider requesting more stringent minimum

requirements under the AVMSD, which would then be considered by the European Union as a whole as to whether they are appropriate. If the targeted Member State believes that the AVMSD is not being properly implemented by the licensing Member State, then the targeted Member State ought to be able to address this in order to ensure that the minimum requirements of the AVMSD are being respected by any Member State from which a service is originating. This is consistent with the “*Country of Origin*” principle.

One option would be for a “country of destination” principle to be considered as an alternative: meaning that if a service is targeted at a Member State (with perhaps a threshold of penetration with consumers in that targeted Member State), then the service should be regulated in that Member State even if the service originates elsewhere.

At least from a legal perspective this is unattractive as it may lead to confusion as to where a service should be licensed and may require a service to be licensed in multiple jurisdictions. From a commercial perspective, it has also been suggested that this could act as a “success tax”. For example, a service may well be based in one Member state for sound business reasons but, if such a “country of destination” rule were applied, it could end up having to pay to be licensed in a number of different jurisdictions. It also runs against the general European principle that goods and services should be freely available throughout the EU, without regulation by one Member State interfering with the availability of goods and services from other Member States.

Services from outside the EU

There is a further discussion (specifically highlighted for comment in the EU Consultation) as to whether services that originate outside the EU but which target consumers within the EU should somehow be subject to licensing in a way that requires them to meet the minimum requirements of the AVMSD. Instinctively, this sounds right: consumers in the EU might expect to be afforded the protections set out in the AVMSD regardless of whether a service originates within or outside the EU. Furthermore, services that originate within the EU should not be at a competitive disadvantage as against services originating outside the EU. As an example, a service originating within the EU must comply with the product placement rules of the AVMSD. It would be unfair for a popular programme that involves significant product placement to be freely transmitted from outside the EU whilst, if originating within the EU, a service carrying that programme would need to make significant changes to remove the product placement before transmission.

It has been suggested that to advocate that a “country of destination” principle be applied to services outside the EU runs contrary to the argument that the *Country of Origin* principle for services originating within the EU should be preserved (see the discussion above). Our view is that the two issues are very different. Services originating within the EU are, by definition, licensed in a way that imposes the minimum requirements of the AVMSD. Services which originate from outside the EU are not subject to this regulatory framework and so it is therefore not unreasonable either for the EU as a whole, or for a particular Member State, to seek to regulate services from outside the EU targeting consumers within the EU (or a particular Member State). This might be achieved by obliging the service provider originating from outside the EU to have an established base in a Member State, which would act as their “*Country of Origin*.”

Country of Origin and Copyright

Another interesting aspect of the debate on “*Country of Origin*” (not as a result of the EU Consultation, but as part of the ongoing discussions in relation to the EU’s Digital Single Market Agenda) relates to whether the same principle should apply to copyright clearance as applies to the licensing of television and on-demand services. The proposal would be that if you clear copyright in one Member State, then you have a license to exploit that throughout the EU.

In our view the two are very different. The regulation of audio-visual services, ensuring that they meet minimum consumer protection requirements, is something which relates to the suitability of the service for EU consumers: something which can be (and is) done by one Member State on behalf of all Member States in many fields. Copyright, by contrast, is a proprietary right which exists in each Member State. The copyright owner is entitled to enforce its proprietary right in each Member State and is able to control the exploitation of that copyright in each Member State. The fact that “*Country of Origin*” may be an appropriate principle to apply to the regulation of audio-visual services does not mean that it is an appropriate solution to the management of proprietary intellectual property rights on a territory-by-territory basis. Whilst there may be a separate debate as to whether copyright licensing and clearance should be streamlined (on which we comment in our review of the **Digital Single Market Agenda**, available on our website), our view is that the

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existence of “*Country of Origin*” as a tried and tested practice for the regulation of audio-visual services is irrelevant to the discussion about copyright clearance for audio-visual content.

Confusion in relation to this issue sometimes arises from a misunderstanding of the 1993 Cable and Satellite Directive (as implemented into English law by The Copyright and Related Rights Regulations 1996). This instituted the principle that a satellite broadcast infringes copyright in the country from which it is transmitted, so would need to clear rights in that country, but it does not prevent the copyright owner from controlling which countries that clearance is given for. Thus rights could be licensed by a UK satellite channel in the UK for exploitation just in the UK, or in a selection of territories or in the whole of the EU: the 1993 Directive does not affect the copyright owner’s ability to impose territorial restrictions.

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