

POLICY ON
CABLE
RE-TRANSMISSION

CORE POLICY

Section 103 of the Irish Copyright and Related Rights Act 2000 (the “Copyright Act”) permits cable operators based in Ireland to retransmit works (including audio-visual works) protected by copyright that are broadcast in the State and the “must-carry” channels without obtaining permission from the copyright holders or paying retransmission fees. Section 103 should be changed so that copyright is preserved in these works when they are transmitted by a cable company based in Ireland.

This section of the copyright act also known as the “Cable Copyright Exemption” was introduced for two main reasons. First, it was believed that the legislation would encourage the rollout of more cable services. Secondly, at the time the only cable company operating in Ireland was Cablelink. Cablelink was owned by RTÉ so to avoid what could have been perceived as “double dipping” it was felt they should be exempt from copyright clearance of Irish broadcasts. As Irish broadcasters (RTÉ, TG4 & TV3) and Irish independent production companies are copyright owners of much of what is broadcast from within the State their rights are being restricted by virtue of the exemption and they are losing revenue rightfully due to them.

The current law confers an unfair economic advantage on the cable companies operating in Ireland at the expense of Irish independent producers and broadcasters. Cable companies operating in other European countries must obey local copyright law and pay retransmission fees for the same kinds of rights. This puts Irish broadcasters and Irish producers at a disadvantage compared to their European counterparts.

Any rationale underpinning the continued existence of Section 103 of the Irish Copyright and Related Rights Act 2000 is no longer relevant. In fact, it may never have been lawful in the first place on the grounds that it seems to violate European Union law.

There are now a number of competing cable companies operating in Ireland and none are under Irish ownership. All benefit from this exemption and are subsidised by Irish copyright holders including our public service broadcasters.

Presently cable operators in Ireland pay approximately €10m per annum to other rights holders, e.g. foreign broadcasters and production companies, composers and record companies.

Programming produced by Irish broadcasters and Irish independent producers forms a significant part of the Irish cable offering. The cable companies who benefit from this offering should be compelled to pay fees for the carriage of natively broadcast content. The State should not aid cable companies in avoiding such payment for quality Irish content.

Principles on which this policy is based

Breach of EU Copyright Law Obligations

The continued existence of Section 103 of the Irish Copyright Act runs contrary to Ireland's legal obligations concerning copyright exceptions under the European Information Society Directive 2000, which, as a "maximum harmonisation" instrument, limits EU Member States' power to legislate further than what is provided for in that instrument.

Articles 5.2 and 5.3 of the Information Society Directive (or "Infosoc" Directive as it is commonly referred) set out a detailed and exhaustive list of copyright exceptions that EU Member States may choose to implement in to national law. For example, Member States may choose to implement a copyright exception for "uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability". Retransmission by cable is not specifically listed among these exceptions nor can it be interpreted to be included within the scope of other exceptions listed and so the S103 cable exception is therefore unlawful and without a legitimate legal basis.

The companies that have suffered the most from this unlawful copyright exception are Irish independent production companies and Irish broadcasters (RTÉ, TG4 & TV3). Predominantly, they are the copyright holders in these broadcasts and Ireland is the largest market for quality, culturally Irish content. Depriving Irish rights holders of a valuable source of remuneration in such a manner is harmful to its continued creation and the Irish broadcasting industry in general.

Were Section 103 of the Copyright Act deemed to be inconsistent with Ireland's EU law obligations the State would be required to make good on the lost profits of rights holders.

Breach of EU State Aid Rules

For the past fifteen years Section 103 of the Irish Copyright Act has acted as a *de facto* State Aid to large non-Irish cable companies based in Ireland instituted by the Irish legislature but financed by Irish rights holders.

It could be argued that State Aid of this type is illegal as it would seem to be contrary to the Treaties Establishing the European Union. State Aid in the EU may generally only be granted on the basis of cultural grounds or on the basis of research and development after having received approval by the European Commission. Alternatively the General Block Exemption Regulation (GBER) is a piece of EU legislation designed to specify further exceptions to this rule and which absolves local governments of the requirement to notify State Aid to the European Commission immediately though ultimately any state aid scheme must be approved and ratified by the European Commission.

We are unaware if Section 103 has received approval in this manner though if it was found to be inconsistent with the rules governing State Aid in the EU any beneficiaries of the scheme may be required to pay back what they have earned as a result of the unfair market advantages accruing to them (e.g. lost licensing costs) since its introduction.

It is important that section 103 of the Irish Copyright and Related Act 2000 is amended for the benefit of rights holders and to mitigate any risk to the State that the exemption gives rise to.

The Broadcasting Act

On a similar note SPI advocates that the introduction of the words “and payment” to Section 77 (11) & (12) of the Broadcasting Act 2009 would further empower Irish rights holders. These changes would read as follows:

(11) Without prejudice to the requirements imposed under sub-section (4), RTÉ, TG4 and the television service programme contractor shall ensure that their must-offer services are at all times offered for re-transmission (subject to agreement as to fair, reasonable and non-discriminatory terms of use and payment) by means of any appropriate network that is ~~available for reception in an intelligible form by members of the public on the whole of or in part of the State—~~used by a significant number of end users as their principal means of receiving transmissions of programme material.

(12) RTÉ, TG4 and the television service programme contractor shall ensure that their must-offer services are at all times offered for broadcast or re-transmission (subject to agreement as to fair, reasonable and non-discriminatory terms of use and payment) by means of every satellite television service.

These amendments address the issue that the must offer obligation which is currently expressed in the 2009 Broadcasting Act can be read as requiring Irish channels to make their free to air television services available to a wide range of platforms with no return or consideration for the content being made. The Act as currently expressed can be read as requiring RTÉ, TG4 and TV3 to make their free to air TV services available to a wide range of networks with no return being made to the broadcasters. This puts Irish channels at a disadvantage when compared to their European broadcast counterparts who often receive significant remuneration from platforms for their content. It is not equitable and does not represent good value for money for Irish license fee payers.

Personal Video Recording Devices

Section 101 of the Irish Copyright and Related Rights Act 2000 should also be changed so that copyright is preserved in programmes recorded and stored by cable operators for use by customers on their Personal Video Recorders (PVR's). Section 101 of the Act currently permits cable operators to provide a commercially valuable service without compensation to the copyright holder.

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Cable Retransmission Policy

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