

— : The Conditional Access Directive: — : a lesser known instrument to fight piracy

The Audiovisual Industry and the Digital Revolution

After years of uninterrupted talking about convergence and the turbulent ups and downs of the dot.com bubble, it seems that the digital revolution is at last bringing its promised benefits to Europe. Broadband uptake is surging everywhere, mobile penetration is close to saturation (with 3G handsets gradually replacing existing phones) and the planned digital switch-over is transforming the way people watch TV, the most popular media of all time. Content, the self-proclaimed king of this revolution, is finally going to be available "anytime, anywhere".

In order to secure the profitability of the whole value chain (from the producer to the distributor, video publisher, TV operator down to the final consumer), the audiovisual industry relies on a series of commercial and technical tools, such as exclusive distribution deals, different release windows, and technical protection measures (also known as Digital Rights Management systems or DRMs). Some of these tools, notably DRMs, enjoy a specific form of legal protection, as recognition of their central role in safeguarding audiovisual content against piracy.

The Conditional Access Directive

The legal arsenal at the disposal of the audiovisual industry to fight against piracy is extensive, ranging from international treaties and conventions, to EU directives and national laws and regulations. At EU level, the main piece of legislation in this respect is the Copyright Directive¹ (hereinafter: EUCD); another key legal instrument in this context is the Conditional Access Directive² (hereinafter: CAD), adopted in 1998. The aim of this directive is to provide for minimum legal standards against circumvention of conditional access-enabled services across Europe. Ten years after its adoption, the European Commission intends to assess the effectiveness of the CAD. KEA (www.keanet.eu), in collaboration with CERNA³, has carried out the evaluation study on the effects of the implementation of the CAD.

The market linked to conditional access represents a significant, and growing, part of the audiovisual market in Europe. Services relying on the protection of conditional

access devices include subscriptions to pay-TV offers via cable or satellite (the principal target of the CAD at the time of its adoption) as well as new kinds of information society services such as IPTV, VOD or mobile TV. Digital Terrestrial TV (DTT) services may also depend on conditional access to offer premium content to subscribers. The size of the pay-TV market in Europe was €25 billion in 2004 (or 27% of the overall audiovisual retail market).

The Commission proposed the CAD as a tool to help pay-TV operators and conditional access service providers tackle cross-border piracy activities by levelling the playing field and eliminating safe harbours. The CAD has been effective in this respect, as it has compelled member states, even those who did not have any specific legislation in place to address piracy of conditional access services, to raise their standards at least in terms of the sanctions applicable to circumvention of conditional access systems.

However, the study shows that many players in the vertical chain of the audiovisual distribution model (pay-TV operators, conditional access services providers, set-top box manufacturers and eventually the final consumer) have an interest in the circumvention of conditional access systems. In economic terms, moral hazard is endemic along the chain (to the extent that piracy figures are considered as business secrets by industry players and never disclosed) – in this respect, the CAD seems unable to address the different incentives to piracy generated by the multi-layer structure of the market.

Besides endogen moral hazard in the pay-TV market, the audiovisual industry is confronted with rampant piracy levels in parallel distribution platforms, notably through unauthorised exchange of content through peer-to-peer (P2P) online networks. This problem, practically non-existent when the CAD was adopted, has become the source of many headaches for the audiovisual sector in recent years. The legal protection offered by the CAD appears insufficient to deal with the level of piracy brought by the Internet. The cause of this inadequacy is rooted in two major misunderstandings linked to the nature of the CAD itself.



1. 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.

2. Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access.

3. CERNA is the lab of industrial economics at the *École des Mines* in Paris. <http://www.cerna.ensmp.fr>

The CAD and the Internal Market

The first misunderstanding concerns the main purpose of the CAD, which in the eyes of the Commission should be a tool to stimulate the provision of cross-border services (notably cable and satellite TV and e-commerce audiovisual services). The Commission considers the establishment of the Internal Market to be the basis for the adoption of the CAD; under this perspective it is possible to state, without fear of being contradicted, that the CAD has missed its objective: to promote cross-border TV services.

Audiovisual markets in Europe remain essentially confined to national territories, with little (if any) overspill across frontiers. This fragmentation is linked to the linguistic and cultural diversity which is a characteristic feature of Europe, as opposed to unified media markets such as the US. Audiovisual media content is optimally marketed through selective discrimination amongst the consumers: the first discrimination criterion is the consumer's willingness to pay (which constitutes the basis for the release windows system and the emergence of the pay-TV and video markets); the second discrimination factor is cultural, and determines the territoriality of audiovisual markets in Europe.

The CAD, as well as other pieces of EU legislation addressing cross-border circulation of content (such as the Cable and Satellite Directive⁴), is helpless in this respect. Content is being licensed by right holders on a territorial basis because this increases its value and generates higher margins. The necessary consequence of this situation is the grey market⁵, which is not addressed by the CAD as it is structurally different from piracy. The grey market provides evidence of the fact that a unified pan-European Internal Market for content is non-existent at present.

The CAD and piracy

The second misunderstanding is related to the role of the CAD as an effective instrument in addressing audiovisual piracy.

Piracy, under the form of moral hazard in the pay-TV audiovisual distribution chain, or extensive P2P practices over the Internet, undermines the value created by the audiovisual industry, and represents a serious threat to the European audiovisual market, already at a competitive

disadvantage with the US due to its fragmentation. The study suggests that the optimum way to deal with piracy is to reinforce the role of the initial ring of the chain, namely the right holders (film and audiovisual producers). Right holders have, in the past, been able to structure a whole range of vertical relations with different distributors and licensees in order to exert a positive discrimination amongst consumers, maximise the value of their product and reinvest the profits generated in new production. This model is exemplified at best by the power that Hollywood wields on the US market – the largest and most profitable audiovisual market in the world.

At regulatory level, strengthening the position of right holders means ensuring that clear copyright rules are adopted and enforced in the market. This has been the objective of the DMCA⁶ and the EUCD; both legislations aim at updating the existing copyright and related rights regimes to address the challenges brought by the development of the Internet and digitisation of content. Even though legal uncertainty has surrounded unauthorised P2P practices for a certain time (copyright exceptions, liability rules for ISPs and privacy protection laws having been invoked as safe harbour provisions by P2P users), it can be argued that the DMCA and the EUCD have contributed to containing the problems raised by Internet piracy⁷.

Yet, sports right owners and broadcasters estimate that their interests are insufficiently protected by copyright law, and do not consider the CAD an effective tool at their service in fighting growing levels of piracy of sports events especially on the Internet.

The study on the assessment of the CAD shows that this piece of legislation has achieved some positive results in updating national legislations to combat pay-TV piracy. However, the CAD does not appear adequate to address the challenges brought by the multiplication of digital delivery platforms – in particular, threats arising from digital piracy. The consultation launched by the European Commission on the CAD provides an opportunity to discuss its merits and shortcomings and to suggest ways of improving it.

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4. 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.

5. The grey market consists in extra-territorial viewings by individuals who receive cross-border transmissions which are not licensed by right holders for the territory on which they are received, yet viewers are not circumventing conditional access systems to receive signals at a discounted price. The grey market is distinct from the black market as viewers rightfully pay a subscription to pay-TV operators and are considered as legitimate clients by the latter. Grey markets can be considered as an intermediate case between legality and piracy.

6. Digital Millennium Copyright Act. Public Law 105-304-Oct. 28, 1998. This act amends the US Copyright Act of 1976.

7. The most important example in this context is the 2005 US Supreme Court Decision on Grokster (MGM Studios Inc. vs Grokster, Ltd.) which put an end to peer-to-peer traffic on Grokster and Kazaa, two of the largest file-sharing software applications on the Internet. The decision was based on the DMCA.



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