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# Copyright Implications of "Must Carry" Obligations*

## *Implicaciones de las obligaciones "Must Carry" para el derecho de autor*

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## Abstract

The "Must Carry" rule by which cable operators are forced to allow access to open national and regional TV channels without additional charge to their subscribers, implies that audiovisual copyrighted contents may be retransmitted through the given signals. Colombian laws have established this rule since 1985. The possible implications of this rule regarding copyright for audiovisual works will be studied here. Colombian retrospective evolution of this rule and the Andean and Colombian copyright law will be revised in what is related to the "Must Carry" rule. Then, some other jurisdictions' approaches to the problem will be examined. From this, it will be established that the retransmission comprehends an act of communication to the public which, in spite of any legal mandate to retransmit from national TV public policies, falls under the right holder's control. In addition, it will be proposed that two concepts developed in Andean case law might fall under the acte clair doctrine recently adopted by the Tribunal of Justice of the Andean Community. One is the definition of retransmission within the communication to the public framework. The second consists in differentiating the authorizations that broadcasting organizations are required to provide for the retransmission of their signals, and the authorization required for the retransmission of the copyrighted content traveling through such given signals.

KEYWORDS

Copyright, retransmission, economic rights, acte clair doctrine, neighboring rights, compulsory licences.

## Resumen

La obligación "Must Carry" por la que los operadores de televisión por suscripción deben permitir que sus suscriptores puedan acceder a los canales nacionales y regionales de televisión abierta, implica una retransmisión de los contenidos audiovisuales protegidos por el derecho de autor que contienen tales señales. Las normas colombianas desde 1985 han establecido esta obligación. Aquí se estudian las posibles implicaciones que para el derecho de autor puede generar la medida "Must Carry". Los antecedentes de la figura en Colombia, el entorno legal andino y nacional aplicable son estudiados, para luego revisar algunas jurisdicciones que han examinado este tema. Así se establece que la retransmisión comprende un acto de comunicación pública sometido al control del titular del derecho, independiente de que exista un mandato de retransmisión derivado de políticas públicas en materia de televisión. Adicional-

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mente propone la posibilidad de identificar como actos aclarados para la jurisprudencia de la Comunidad Andina: la definición de retransmisión en el marco del derecho de comunicación pública, y la diferencia entre la autorización para retransmisión de los organismos de radiodifusión respecto de sus señales y la autorización para retransmitir el contenido protegido que se encuentra en la señal.

Palabras clave

Derecho de autor, retransmisión, derechos patrimoniales, doctrina del acto aclarado, derechos conexos.

## INTRODUCTION

Several years ago, the U.S. government developed a public policy aimed at guaranteeing access to television broadcast signals. The tension between local and national production and the possibility of generating a specialized market for local broadcasting slots determined the need to create a system that would guarantee, in the first instance, that the programs would reach those audiences that did not receive terrestrial broadcasting, and, therefore, local programs. This was mainly due to the fact that, in certain territories, the signals carrying television programs could not overcome geographical barriers such as mountains or other barriers. However, cable operators could reach these areas with their own programming, given the nature of their transmission infrastructure. The figure was called “Must Carry”, and, in broad terms, it means that the State imposes on cable television operators the duty to retransmit national and regional free-to-air television channels through their networks or systems.

The nature of such obligation entails that the signals of such channels, as well as their contents, are retransmitted by the cable television operator, thus making use of property protected by copyright or related rights. This entails a collision between the interests of such cable television operators, the imposition of the State, and the rights related to the signals and contents thus retransmitted. The problem lies in establishing whether such State imposition generates a limitation to the copyright and related rights, which would free private operators from obtaining such license.

The problem raised in relation to the duty of cable television operators to obtain licenses to comply with the obligation to retransmit open television channels through their networks takes on great importance, since it determines a source of income necessary in a competitive market for this type of open television operators, as well as for the producers of the contents that are transmitted through such channels. In the current transformation of audiovisual content markets, in the use of streaming platforms such as Netflix, Amazon Prime, or HBO, this situation is even more evident since it is the content and the right over it the substantial element that determines the possibility of producers to access these new markets.

Given the nature of copyright and its object of protection, which usually has an impact on the markets of different countries, this article aims to develop the relevant knowledge on the application of copyright rules to a figure such as the “Must Carry”, so that Colombian judicial decisions are increasingly consistent with the global trends of our country’s trading partners. It is worth noting that, as will be shown, it has been the development of the Andean case law on this subject that allows for the possibility of identifying certain aspects of this debate as *acte clair*

within the framework of the case law of the Court of Justice of the Andean Community (hereinafter TJAC)[1] .

This issue is also relevant because Colombia is a party to various international multilateral treaties and conventions on intellectual property and copyright.

The main issues to be analyzed in this article refer to the implications in the field of copyright of the figure of "Must Carry", that is, the duty imposed by the State on subscription television operators to retransmit through their systems the signals and contents of open television channels in the country. The working hypothesis in this sense will be to establish that the retransmission of audiovisual works is subject to the control and due prior and express authorization of the owners of rights over such works. Therefore, the retransmission of programming contents requires an independent and different authorization from that granted for the retransmission of television signals whose owner is the broadcasting organization. By virtue of the foregoing, it will be possible to indicate that the retransmission of broadcast works, carried out by an organization different from the one of origin, brings the work to a "new public", and constitutes a new "window" of diffusion for the audiovisual work.

## METHODOLOGY

Different aspects will be taken into account for the aforementioned study. Initially, a brief review of the historical-legal background of the regulation of "Must Carry" in Colombia, from the first rules related to television, is presented, for which primary and secondary sources are used.

Once this study has been carried out, an analysis will be made of the general legal concepts that the applicable Colombian legislation on copyright establishes in relation to the subject, including the application of the respective Andean law. As an additional result, derived from the recent development of the theory of the acte clair adopted by the TJAC (Agreement 06, 2023), two legal problems that could shape acte clairs in the case law of said Court will be identified.

Finally, a review will be made of the case law and doctrine of different countries and supranational entities with regulatory similarities or legal transplants that are evident in Colombian legislation. These are the United States, the European Union, the United Kingdom, and Spain.

[1] It is important to note, however, that this article does not intend to make a normative review of the scope of the acte clair within the framework of the Andean Community of Nations and the Andean Community Court of Justice (Andean Community Court of Justice, 2023).

The result of these studies will lead to the formulation, based on the aforementioned information and documentation, of a position with respect to the “Must Carry” figure in Colombia, and its projection towards the consolidation of the legal landscape applicable to this figure in the Colombian and Andean framework.

This article responds to an almost inexistent recent bibliography in the country on the subject that requires greater attention in the academic context, especially in view of the challenges that the development of similar policies in frameworks such as the digital one may imply in the future.

## OVERVIEW OF THE NATIONAL LEGAL FRAMEWORK RELATED TO THE “MUST CARRY” FIGURE

In Colombia, television legislation has developed through tensions between the commercialization and prevalence of private interest as the main mobilizer of resources for content production, on the one hand, and the public interest regulated by the State and the influence that politics and power have on this media, on the other. Authors such as Buenaventura or Vizcaíno give an account of this complex relationship that largely determines the legislative history of this country (Buenaventura Amézquita, 1988; Vizcaíno, 2005).

Law 42 of 1985, by authorizing subscription television, introduces an important initial element in this development, since the subscriber can now have access to foreign production channels supported by a much greater financial muscle, creating an important pressure for producers and national and regional channels, and, in a way, introducing a variation in the relationship between public interest, politics, and economic commercial interest.

In response to that, and following, in a certain way, the line proposed by the United States in relation to the guarantee of the provision of television services, the Colombian legislation introduces a first figure similar to “Must Carry”.

The first regulations on this subject are developed from the aforementioned Law 42. Regulatory Decree 666, issued by the Ministry of Communications in 1985 on this matter (Decree 666, 1985), in its Article 9, establishes the duty of programming contractors to sign copyright agreements, including those “related to the original programming stations”[2]. Additionally, the Decree, in its article 18 a), establishes a minimum of 5% of national programming to be presented, which

[2] The programming contractor, according to Decree 666, “is the person who supplies and selects the content of the programming to be transmitted through the system”. There is also the figure of the operator-programmer contractor: “the person who installs the equipment and the network necessary to carry the Pay TV service and selects and supplies the content of the programming transmitted by the system”.

implies the possibility of rebroadcasting programs "previously transmitted by the channels of the National Institute of Radio and Television -Inravisión- once the respective Copyrights have been cancelled". Paragraph j) of the same article states: "Whatever the technology used, the reception of Inravisión's channels will be guaranteed without interference originated in the operation of the Pay TV system".

The subsequent Law 14 of 1991, articles 43 to 49, also develops the regulation for subscription television, declaring it of public character under the possibility of granting concessions on it. Four years after this norm, Law 182 of 1995 is issued, which reforms it, already within the validity of the Political Constitution of 1991. Although it maintains an important weight in the tension related to the intervention of the State in the regulation of television, the exercise of power, and free trade, the 1995 Law opens the field to a greater orientation towards the market, as pointed out by Vizcaíno (2005). This is modified in relation to private television by Law 335 of 1996. In development of this norm, the then National Television Commission (hereinafter, CNTV) by means of article 12 of Agreement 14 of 1997, established: "The operators of the subscription television service must guarantee without any cost to the subscribers, the reception, without interference, of the Colombian open television channels that are tuned in the authorized coverage area" (1997).

Since then, the doctrine has already understood that this statement, by not pointing out anything in particular in relation to the copyright regime, would leave the responsibility of the pay television operator to carry out the necessary actions to comply with such mandate (Ríos Ruiz, 2009, p. 391). This, taking into account that Law 335 of 1996 states in its 8th article (which amends Article 43 of Law 182 of 1995) the creation of a Plan for the Promotion and Standardization of the Pay TV Service by the CNTV, which "must ensure that copyright is respected..." (Law 335, 1996), a plan that derives in the aforementioned Agreement 14 of the CNTV.

Article 11 of Law 680 of 2001 imposes on subscription television operators the duty to guarantee the reception of Colombian free-to-air television channels[3]. This article, which partially reproduces the aforementioned article of Agreement 14, was analyzed by the Colombian Constitutional Court, which found it to be adequate to the superior order. The basis for this decision is related to one of the aspects that has been pointed out so far, the tension between the State's interest in regulating television as a matter of public interest, and the support of the private and

[3] The aforementioned article reads as follows: "Pay TV operators shall guarantee free of charge to subscribers the reception of Colombian national, regional and municipal open television channels that are tuned in VHF, UHF or via satellite in the area of coverage only. However, the transmission of local channels by Pay TV operators will be conditioned to the technical capacity of the operator." (Law 680, 2001)

commercial interest as an important agent in the scheme. The Court pointed out the superior interest of the public and the State over television, which, protected in Article 75 of the Colombian Constitution, is understood within the public character of the radio electric spectrum. Although the attack of unconstitutionality to the norm refers to a possible competitive advantage created in favor of national television, the Court's reasoning points out precisely the differences in the markets of open television systems and subscription or cable television, to conclude that there is no real competition between the two systems "...since, as previously stated, subscription television operators are not on equal terms with respect to open television operators" (Constitutional Court, C-654, 2003).

Article 11 of Law 680 is still in force, and it is one of the elements that determines the problem under study here.

Even more important is the Court's analysis of the purpose of this measure. To this end, it pointed out that this provision was created in order to guarantee the right to pluralism of information for the entire community. The Court recalls that the television service is a public service subject to the control of the State, and that, as such, the operators of this service are called upon to respect and promote the guarantees, duties, and fundamental rights "...strengthening democracy and peace and promoting the dissemination of human values and cultural expressions of national, regional, and local character" (Constitutional Court, C-654, 2003).

For the Court, this measure is not only proportional in relation to the sought benefit, the right to receive free and impartial information, it does also generate a benefit to cable television subscribers, since they receive, without having to pay an additional cost, the possibility of accessing national television.

Law 1341 of 2009, which integrates the complete structure of television to the telecommunications framework is amended by Law 1978 of 2019, introducing a numeral 9 in Article 2 of Law 1341, pointing out the principles that guide the television service in relation to the promotion of multiplatform content of public interest[4] .

[4] The aforementioned numeral reads as follows: "The State shall guarantee the promotion of multiplatform contents of public interest, at national and regional level, to contribute to citizen participation and, especially, in the promotion of civic values, the recognition of diverse ethnic, cultural and religious identities, gender equity, political and social inclusion, national integration, the strengthening of democracy and access to knowledge, especially through public radio broadcasting and public television, as well as the use of new public media through multiplatform mechanisms" (Law 1978, 2019). Additionally, this regulation states in its article 32, subsection 2: "The inclusion in the general qualification regime of operators of subscription television and community television service does not imply the modification of the legal classification of this service as de-

The review of this legal panorama leads to indicate that the obligation of cable television operators to retransmit Colombian open television channels has an orientation towards the public function of television, on the one hand and, on the other, they seek to guarantee access to such channels under equal conditions for the entire population, without representing an additional charge for subscribers.

Finally, ANTV Resolution 2291 of 2014, in its second article, second paragraph, states that "broadcasters, under the pretext of the cancellation of economic rights, may not deny their prior and express consent to cable television operators" to comply with the "Must Carry" obligation. This rule, still under study by the Council of State[5], was supported by ANTV Agreement 02 of 2012, which was repealed by ANTV Resolution 1022 of 2017. However, in an analysis of the set of rules that have been reviewed, it is clear that, by constructing, in a strange way, a kind of compulsory license for the fulfillment of the "Must Carry" obligation, the paragraph in question of Resolution 2291 is contrary to the superior rules on which it is based. Additionally, this provision has serious effects in relation to copyright, as will be explained in section 3 of this article.

Several conclusions can be drawn from the previous analysis. First, the figure by which the retransmission of open television signals is imposed on subscription or cable television operators is a figure that has existed in Colombian regulations since 1985. Second, it is a figure that serves, as noted by the Constitutional Court in the aforementioned ruling, a public interest, whereby the State exercises control over the electromagnetic spectrum and protects the interest of communities to have access to a complete horizon of national and regional production, protecting diversity and cultural exchange. Third, respect for copyright and related rights involved in the activities developed by cable television operators not only cannot be discarded within the figure, but on several occasions the rules have indicated this duty.

Article 11 of Law 680 fails to configure a limitation to the right, since it does not satisfy the three-step rule of the Berne Convention and Andean Decision 351 of 1993, since, as demonstrated throughout this document, such situation generates an unjustified prejudice to the legitimate owner of the copyright that cannot be satisfactorily resolved in the regulatory framework.

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fined by Law 182 of 1995. This includes compliance with all other obligations of legal, statutory and regulatory origin, applicable to the service."

[5] Radicación 11001032400020170025600, Sección Primera del Consejo de Estado, nullity action against the second paragraph of the second article of Resolution 2291 of September 22, 2014. Plaintiff Filipo Ernesto Burgos Guzmán.

## ANALYSIS OF COPYRIGHT REGULATIONS IN RELATION TO THE "MUST CARRY" FIGURE

As previously stated, the issue at stake in this article refers to the copyright implications of the rules that impose on cable television operators the duty to retransmit national and regional open television channels through their networks at no additional cost to the subscriber.

It is necessary to clarify that, in the international framework, with respect to the treaties on copyright of which Colombia is a member, it is found that the Berne Convention in its article 11bis.1.ii, when referring to any communication to the public, by wire or wireless, of the broadcast work, when this communication is made by a different organization than the original one, includes the retransmission of broadcast works by means of cable, as an act of communication to the public, subject to the control of the author or the owner of the right, provided that it is a communication made by an organization different from the original one (Ficsor, 2003).

In turn, the WIPO Copyright Treaty extends the concept of communication to the public: "

Article 8, before the clarification concerning interactive transmissions ("including...," etc.), contains two elements. The first element is a mere safeguard reference to those provisions of the Berne Convention which provide for different forms of communication to the public (by wire or by wireless means), that is, Articles 11(1)(ii), 11bis(1), 11ter(1)(ii), 14(1)(ii) and 14bis(1). It clarifies that they continue being applicable. It is to be noted that all these provisions cover traditional, non-interactive acts of communication to the public." (Ficsor 2003, 210)[6] .

### Andean Community Law

#### *The Right of Public Communication and the Right of Retransmission*

Copyright includes all forms of exploitation of works. In this sense, one of the ways in which works (particularly musical and audiovisual works) are traditionally used is by means of public communication. This right has been defined by Andean Decision 351, article 15, as the possibility for the author to allow or not "any act by which a plurality of persons, whether or not gathered in the same place, may have access to the work without prior distribution of copies to each of them" (Andean Decision 351, 1993)[7].

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[6] See also: (Lipszyc 2004, 138-140)

[7] The protection clause of this right is stated as follows: "Article 13.- The author or, as the case may be, his successors in title, have the exclusive right to make, authorize or prohibit: (...) b) The public communication of

The case law of the TJAC has repeatedly interpreted the provisions relating to public communication by pointing out two elements inherent to this form of exploitation. The first is that the work be made available for access by a plurality of persons, whether or not gathered in the same place. Second, that there has not been a previous distribution of copies of the work to the members of the public. Additionally, according to the court, the communication must be made for a collective, and therefore the domestic or family environment is excepted. These elements were recognized as part of the criterion of legal interpretation of the acte clair, for being uniform, stable, and coherent on the object, scope, and content of the right of public communication and are found in process 383-IP-2021 (Court of Justice of the Andean Community [TJAC], 2023, pp. 8-10)[8] .

One of the forms in which the right of public communication is evident is the retransmission of broadcast or televised works, whether by wire, cable, optical fiber or other analogous procedure, whether or not by subscription (Article 15, paragraphs e) and d) of Andean Decision 351)[9] .

The concept of public communication, and more specifically that of retransmission, has been clarified by the case law of the TJAC in several of its preliminary rulings. Thus, in case 39-IP-99, when faced with the need to define the scope of the rights of retransmission of works protected by copyright, the Court drew attention to the meaning of articles 13 (b) and 15 (e) of Andean Decision 351 of 1993.

In relation to article 13 of the aforementioned norm, the TJAC establishes that the nature of the author's economic rights is exclusive, transferable, temporary, and renounceable. The act of communication may be direct or indirect. The first case being that which takes place live, and the second that which takes place by means of "a broadcasting agent such as radio broadcasting, satellites, and cable distribution" (TJAC, 39-IP-99, 2000, p. 6)[10] .

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the work by any means that serves to disseminate the words, signs, sounds or images."

[8] Also: (TJAC, 39-IP-99, 2000, p. 6; 464-IP-2017, 2018, para. 6.20)

[9] Article 15. Communication to the public is understood to be any act by which a plurality of persons, whether or not gathered in the same place, may have access to the work without prior distribution of copies to each of them, and in particular the following: (...) d) The transmission of works to the public by wire, cable, optical fiber or other analogous procedure, whether or not by subscription; e) The retransmission, by any of the means mentioned in the preceding paragraphs and by a broadcasting entity other than that of origin, of the broadcast or televised work" (Andean Decision 351, 1993).

[10] In the same sense, the Court has ruled in different preliminary rulings. Among the most recent are: (TJAC, 46-IP-2017, 2019a; 544-IP-2018, 2019b).

Further on, the same Court points out the different types of public communication, among which is transmission, defined as "the act of sending at a distance works, data, information or the representation, execution or recitation of the work, without materially transferring it, by suitable wire or wireless means" (TJAC, 39-IP-99, 2000, p. 7). It also specifies that cable-distribution consists of the distribution of signals to the public by wire, cable, fiber optic or laser beam.

Regarding the retransmission of works, the 39-IP-99 enters into a deeper analysis of the matter by interpreting the already mentioned article 15, paragraph e), to clarify that retransmission, according to the definition of article 3 of the same Andean norm, consists of "remission of a signal or a program received from another source, carried out by wireless broadcasting of signs, sounds or images, or by wire, cable, optical fiber or other analogous procedure". The Court then specifies that it is the "transmission of the work to the public by an organization other than that of origin" (TJAC, 39-IP-99, 2000, p. 8)[11].

Antequera Parilli, explaining the scope of the retransmission right, pointed out that retransmission "constitutes a form of public communication exclusive to the holder of the respective right and in accordance with the "independence of rights", the authorization granted for the original transmission of a work (wired or wireless) does not imply or reach the authorization for the retransmission of that original broadcast, whether using the radioelectric space or by means of artificial guides (Antequera Parilli 2001, p. 169).

By means of Prejudicial Interpretation 122-IP-2020, the TJAC clarifies the scope of the right of retransmission of audiovisual works indicating that this shall consist of an act of public communication under the following conditions:

a) That the retransmission is made by any of the forms of public communication set forth in Article 15 (a), (b), (c) and (d) of Decision 351.

b) That the retransmission of the broadcast work, by any of the aforementioned forms, is made by a broadcasting organization (e.g., a subscription television or closed signal company) other than that of the origin.

c) That the content retransmitted by a broadcasting organization is a work protected by copyright (TJAC, 122-IP-2020, 2020a, p. 42).

[11] Emphasis in the original text. The Prejudicial Interpretation 39-IP-1999 is reiterated in: (TJAC, 122-IP-2020, 2020a, p. 37).

This criterion is reiterated in several preliminary rulings of the Court, which could constitute a clarified interpretation of Articles 13 and 15 of Andean Decision 351 regarding the scope of the concept of retransmission of audiovisual works[12]. As can be seen in the series of rulings indicated at the foot of the page, these aspects have been interpreted in a uniform, stable, and consistent manner.

Process 221-IP-2021 specifies not only the scope of article 15, paragraph e), but also extends to paragraphs f) and i) to indicate that there is public communication of an audiovisual if it was originally broadcast on television and subsequently transmitted by any technology (f)) or in general the dissemination of any known or to be known process of signs, words, sounds or images (i)).

## *Authorization for Retransmission of the Signals Does Not Imply Authorization for Retransmission of the Work Contained Therein*

Given that the problem in question refers to the retransmission of the signals of open television channels, it is important to note that, in repeated decisions, the TJAC (371-IP-2017) has specified that:

> Broadcasting organizations, as well as performers and producers of phonograms, are holders of related rights, which are defined as those that confer protection to those who, without being authors, collaborate with their creativity, technique, skill, organization, or distribution in the process by which a given work is made available to the public.
>
> Although related rights are not properly artistic, literary, scientific creations, they do contain sufficient creativity, technical dimension, and disposition to reach the grant of an intellectual property right (TJAC, 570-IP-2018, 2018, p. 47).

It is then evident, both for the Court, as well as for the legal tradition in the field of copyright, that there is a clear difference between the rights of the creators of literary and artistic works, and the so-called related rights, which do not have the same nature or conceptual or historical origin. That is why they are different right holders, and that is why the authorization of the latter for the use, for example, of their broadcasting signals, does not imply the authorization of the former for the retransmission of their works contained in such signals. This would simply mean to dispose of other people's rights.

[12] The criteria related to retransmission as part of the right of public communication are reiterated in: (TJAC, 139-IP-2020, 2021 p. 29; 221-IP-2021, 2022b, pp. 19-22; 144-IP-2020, 2022a, p. 19; 257-IP-2021, 2022c, p.56)

In process 225-IP-2015, the TJAC, deciding precisely on the nature of the related right of the broadcasting organizations in respect of which Article 11 of Law 680 establishes the duty to retransmit their signals by pay TV operators, indicates the separation and independence between these rights and the rights over the works contained in the signals broadcast and then retransmitted. Says the Court:

> It is important to reiterate that the content of the signals of broadcasting organizations may be protected by copyright or related rights, protection which, as previously mentioned, is independent of the protection granted to broadcasting organizations over their own broadcasts. Consequently, an unauthorized retransmission may imply not only an infringement of related rights owned by broadcasting organizations, but also of author's -composer's or producer's- or artist's rights.
>
> By virtue of this, the broadcasting organization must have the corresponding authorization in order to carry out a transmission that includes content protected by copyright or artist's rights.
>
> Consequently, authors, composers or producers will enjoy a right to authorize not only the broadcasting of the works, but also the public communication of these by a broadcasting organization other than the one from which they granted the authorization (TJAC, 225-IP-2015, 2016, p. 10)[13] .

The distinction pointed out by the TJAC is developed in several preliminary rulings starting from the aforementioned 225-IP-2015, in which it is determined that the authorization, of any nature, that allows a third party different from the broadcasting organization of origin of the signal, to retransmit said signal, is separate, different and does not imply the authorization of the copyright holder over the contents of said signal, i.e., the audiovisual works themselves[14] .

In this way, one more element is constructed that could be part of an interpretation as a ***acte clair*** with respect to the scope of the rights of authors regarding the retransmission of their works and the related right of broadcasting organizations.

The foregoing has additional support in the rules that have been analyzed in the second section of this article, since it is clear that, from its first version, the rule that establishes the "Must Carry" leaves unharmed the rights of authors and holders of related rights, which must be respected by cable television operators.

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[13] Underlining in the original. In the same sense is: (TJAC, 371-IP-2017, 2018; 570-IP-2018, 2020b, p. 21).

[14] In such sense are the processes (TJAC, 570-IP-2018, 2020b, p. 21; 122-IP-2020, 2020a, p. 41; 139-IP-2021, 2021, p. 27; 221-IP-2021, 2022b, p. 25; 144-IP-2020, 2022a, pp. 14-15; and 257-IP-2021, 2022c, pp. 51-52).

## National Law

We can affirm that, in Colombia, the right of communication to the public includes the retransmission of works protected by copyright, whether this retransmission is by wireless means or by wire, cable, optical fiber or other analogous procedure[15]. In the same sense, Ríos has stated: "It is clear and generally accepted that when a retransmission is made by means of a cable operator of a broadcast from a broadcasting organization, we are dealing with a new form of use, that is to say, a different use with respect to the works originally transmitted by radio waves; therefore, it is necessary to have the prior and express authorization of the owners" (Ríos Ruiz 2009, p. 392). Such retransmission is the one made by another organization different from the original one.

The concept of public communication has been studied by the Colombian Constitutional Court in a concrete manner when analyzing the right of remuneration for public communication for the directors of audiovisual works. For the Court, this right responds to "the need for the creation to be subject to the access of a plural number of persons, gathered or not in the same place, provided that there has not been a prior distribution of copies of the work. In practice, this includes disclosures made in a movie theater or in hotels, and the broadcast originating from a television operator, a cable operator or digital platforms" (Constitutional Court, C-069, 2019)[16]. Such acts, on the one hand, are subject to the control of the right holder, and in the case that occupies the Court in the cited judgment, it also generates the right of remuneration that Law 1835 of 2017 establishes by reforming Article 98 of Law 23 of 1982.

Derived from the jurisprudential line demonstrated in the previous TJAC, the Superior District Court of Bogota has recognized, in two recent decisions, that the "Must Carry" obligation of Article 11 of Law 680 of 2001 entails the duty of the respective subscription television operators to have the corresponding licenses for the retransmission of the audiovisual works contained in the signals that are retransmitted, and that such authorization is different and independent from the authorization that the broadcasting organization of origin of the retransmitted signal may have granted for the retransmission of the signal itself (Superior Tribunal of Bogota, Civil Chamber, Egeda Colombia vs. Cable Cauca Comunicaciones SAS, 2021; Superior Tribunal of Bogota, Civil Chamber, Egeda Colombia vs. Telmex, 2023).

[15] Law 23 of 1982, Article 12 (as amended by Law 1915 of 2018, Article 3), and Article 78.

[16] In the same sense: (Constitutional Court, C-282, 1997).

## “MUST CARRY” IN OTHER JURISDICTIONS

In the international context, other jurisdictions have similarly addressed the implications that the figure of “Must Carry” may have on copyright. This section will review some approaches that may serve as indicators of the soundness of the line of interpretation followed by the TJAC and the Superior Tribunal of Bogota. These jurisdictions include the United States, Canada, the European Union, the United Kingdom, and Spain. For reasons of space, the study of other countries included in our research has been left aside.

### United States

Through the Cable Communications Policy Act of 1984, the U.S. television system created the “Must Carry” imposition that implied the creation of compulsory licenses in favor of cable operators, so that they would not have the need to negotiate with the copyright owners of the retransmitted works.

This situation is not entirely peaceful[17]. Authors such as Fan have pointed out that in the case of “Must Carry”, although compulsory licenses are a response to a market failure, it is also true that they are a limitation to the free exercise of the constitutionally protected property right in the United States (Fan 2000, p. 640), as well as in Colombia. The U.S. Copyright Office itself has pointed out that the imposition of compulsory licenses is the last resort available to correct this market failure in order to guarantee the reception of television channels by the population[18]. Compulsory licensing avoids the need for cable operators to negotiate the exploitation of retransmitted works with their copyright holders.

### European Union

According to Brison and Depreeuw (2017, p. 99), the main elements that have been elaborated for the interpretation of the right of public communication in the European Union are based on the principle that seeks to grant authors and copyright holders the highest possible level of protection and appropriate reward for the use of their works or performances.

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[17] See American Civil Liberties Union (ACLU) v. Federal Communications Commission (FCC) (D.C. Circ. 1987). In this case, the U.S. Court of Appeals for the District of Columbia District Court of Appeals addresses the implementation of the aforementioned rule.

[18] This is pointed out by the office of the Registrar of Copyrights in its report on compulsory licenses for cable or satellite signal carriers (Register of Copyrights, 1992) Cited by Fan (2000, pp. 640-641).

In this regard, it is specified by these authors that the concept of communication to the public, according to Article 3.1 of the European Directive 2001/29 (2001)[19], refers only to a communication to a public that is not present where the communication originates[20]. This right requires two elements. On the one hand, the act of communication, whereby members of the public have access to the works, regardless of the technical means or processes used for this purpose. Brison and Depreeuw point to multiple decisions of the Court of Justice of the European Union on this subject[21]. Moreover, the communication must be made to an undetermined public (Brison & Depreeuw 2017, p. 103). Additionally, the authors indicate that it does not matter that people have actually used the possibility to access the work, what matters is that the work is accessible by that public[22].

However, if the communication is made by means of the same technology, a "new public" is required as a parameter to define whether a new act of communication to the public has taken place. Indeed, the landmark judgments of the European Court in this regard are the Football Association cases (ECR, 2011), as well as the SGAE judgment. If the retransmission is made by means of a technology different from the technology of origin of the broadcast, the definition of whether or not there is a new public becomes irrelevant as it will always be a new act of communication (Brison & Depreeuw, 2017, p. 105)[23].

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[19] Article 3: Right of communication to the public of works and right of making available to the public other subject-matter. 1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. 2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, 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: (a) for performers, of fixations of their performances; (b) for phonogram producers, of their phonograms; (c) for the producers of the first fixations of films, of the original and copies of their films; (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite. 3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

[20] See Case *C-283/10 Circul Globus Bucuresti v UCMR - ADA*. Court of Justice of the European Union. Cited by: (Brison & Depreeuw, 2017:99).

[21] Such are for example: *Case C-306/05 SGAE v Rafaek Hoteles SA; Case C-403/08 and C-429/08 Futbol Association Premier League and others v QC Leisure and others*; and Case C-351/12 OSA v Léčebné lázně Mariánské Lázně a.s..

[22] SGAE case cited by: (Brison & Depreeuw, 2017, p. 104).

[23] In the same sense, Torremans expresses it in a concrete way: "An act of communication refers to any transmission of protected works, irrespective of technical means or process used. And any transmission or

To support this conclusion, the Court defines two basic elements. 1) That, according to the European Directive 2001/29, recital 23, the author’s right to allow or not the acts of communication to the public of works includes “any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting”. 2) That from article 3 of the same Directive, it is understood that “authorising the inclusion of protected works in a communication to the public does not exhaust the right to authorise or prohibit other communications of those works to the public “, (ECR, 2013, p. 23) i.e. an argument similar to the exhaustion of the right that can be observed in certain cases in the distribution of copies of the works included as tangible objects does not apply.

Then, the Court establishes a first conclusion: that in cases where a work is subject to multiple uses, each transmission or retransmission made by a specific technical means must be individualized by the right holder. Additionally, the Court specifies, the “simultaneous, unaltered and unabridged retransmission by satellite or cable of an initial transmission of television or radio programmes containing protected works, even though those programmes may already be received in their catchment area by other technical means, such as by wireless means or terrestrial networks” require a new authorization from the copyright holder based on Articles 2 and 8 of European Directive 93/83 (ECR 2013, pp. 24, 25).[24]

Finally, the Court points out that, if the retransmission of a terrestrial television broadcast is made by a specific technical means different from the means of the original communication, it is understood to be a “communication” within the meaning of Article 3 of Directive 2001/29.

The recent European Directive (EU)789/2019 on copyright and related rights in certain online transmissions and retransmissions of radio and television programs, reiterates in its article 4.1 the principle of independence of rights, indicating that the online transmission of signals does not include the authorization of the copyright contained in the signal. This Directive complements the concept of retransmission already defined by article 1.3 of Directive 93/83 for cable

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retransmission that uses a specific technical means must separately be authorized” (Torremans 2017, pp. 89-90, 94).

[24] Articles 2 and 8 of the aforementioned Directive state: Article 2. Broadcasting right. Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works, subject to the provisions set out in this chapter. Article 8. Cable retransmission right. 1. Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators. 2. Notwithstanding paragraph 1, Member States may retain until 31 December 1997 such statutory licence systems which are in operation or expressly provided for by national law on 31 July 1991..

distribution. In that Directive, article 2.2 defines retransmission as any retransmission that is simultaneous, unaltered, unabridged, and intended for reception by the public where the initial transmission is wired or wireless, including via satellite, but not online, provided that two conditions are met. The first is that the retransmission is made by a party other than the party making the initial transmission, regardless of the manner in which the retransmitting party obtains the program-carrying signals for the purpose of retransmission. The second is that the retransmission is carried out in a managed environment (Directive (EU) 2019/789, 2019)[25] .

## United Kingdom

The case studied by the Court of Justice of the European Union, TV Catchup v. ITV (Case C-275/15) (ECR, 2017) establishes the prevalence of the protection of the authors' right to allow or not the public communication of their works by means of retransmission systems. The question of the Civil Division of the Court of Appeal for England and Wales raised to the European Court referred to the application of Article 9 of European Directive 2001/29, specifically in relation to English rules according to which simultaneous retransmission by cable operators of signals broadcast and carried out by a legal mandate are not subject to copyright (Reed, 2015), as stated in Section 73 of the English Copyright, Designs and Patents Act (1988)[26].

In TV Catchup, the European Court pointed out that the concept of "cable access" is completely different from the concept of retransmission under copyright law, and particularly under the European Directive 2001/29, which specifically refers to the transmission of audiovisual material. The Court further clarified that the Directive had already clearly stated that the Directive would leave existing European copyright legislation untouched with respect to the broadcasting of programs via satellite and retransmission by cable (Article 1.1.c) of Directive 2001/29)[27]. Finally, it established that the interpretation of Article 9 does not allow for the national legislation of a

[25] For further reading on Directive 789: (Erdozain López, 2020).

[26] Article 9 of European Directive 2001/29: Continued application of other legal provisions. This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract. (European Directive 2001/29, 2001).

[27] European Directive 2001/29. Article 1. Scope. 1. This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society. 2. Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to: (...) (c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission; (...).

member country to establish that copyright is not infringed by the effect of immediate retransmission by cable, even if this derives from public service obligations (ECR, 2017, p. 29), as would be the case of "Must Carry" obligations.

It is striking that, although there was no direct mandate from the European Court, the British government, following the TV Catchup case, repealed section 73 of the Copyright, Designs and Patents Act by means of section 34 of the Digital Economy Act, 2017 (Digital Economy Act, 2017)[28], and consequently, the "Must Carry" obligation in English law entails the need to obtain the respective licenses.

In any case, in the TV Catchup case, the Court clarifies that, the right of public communication as regulated in Directive 2001/29 must be interpreted as openly as possible so as to satisfy the objective of the Directive itself, which is to promote a high degree of protection for copyright.

## Spain

The reiteration of judicial decisions on the subject matter of this article can be seen in the rulings of the Civil Chamber of the Supreme Court of Madrid, which has reiterated the nature of the concept of public communication, and, in particular, its relationship with cable retransmission of broadcasts. For example, in the case of EGEDA v. Cabo TV Sesteiro S.A., the Supreme Court specified the concept of retransmission and its relationship with public communication as follows:

> Retransmission occurs when a broadcast signal, in any of the possible modalities, is received by an entity other than the one that broadcasts (or transmits) and through a broadcasting network, whether its own or not, makes it available for use by the public. The primary broadcasting entity performs the "emission" - wireless launching of the broadcasting signal - and the secondary broadcasting entity receives or captures it and makes it available - retransmits it - to the public. No alteration, modification or transformation of the signal is necessary. In short, there is retransmission in the cable communication of the works by an entity other than the entity from which the signal originates. (...)
>
> c) There is "communication" because it is sufficient that the work is made available to the public so that it may have access to it.

[28] Reed (2015, p. 183) notes that in probably as a result of TV Catchup, the European Commission initiated proceedings against the United Kingdom, understanding "*in particular, that each transmission and re-transmission of a work using specific technical means must be individually authorized by the rightholder, notwithstanding that the work can already be received in the relevant catchment area by other technical means*".

> d) There is “public” communication, because there is a plurality of persons -an undetermined number of potential viewers- who may have access, without the numerical determination of the addressees being relevant.
>
> e) The reference to the fact that the receiving entity is just another consumer is of no interest. What is transcendent is that whatever its nature, it constitutes a different entity from the one from which the signal originates. The retransmission it performs constitutes by itself a new and proper diffusion of the work. Therefore, the reference to the fact that the rights of the producers have already been paid by the broadcasting entity lacks argumentative effectiveness. The authorization to the latter does not include that of the retransmission by a different entity.
>
> f) The appraisal by the appealed judgment of the exception of the second paragraph of art. 20.1 IPL clashes with the fact that one of the cumulative requirements is missing: the one related to the non-integration or connection of a broadcasting network of any kind.
>
> g) Finally, it is irrelevant whether or not the broadcasting network is interconnected; whether or not the broadcasting is wired or wireless; whether or not a fee is paid to the retransmitting entity; whether or not the latter obtains an economic profit; whether or not the telecommunication regulations are complied with; the public or private nature of the retransmitting entity; and whether or not the network is intended to meet the demand of the inhabitants of a geographical area “television shadow” to which it does not belong; whether or not the retransmission entity is public or private, and whether or not it is the ultimate consumer; and the purpose of the network to meet the demand of the inhabitants of a geographical “television shadow” area that is not reached by conventional broadcasting. (Supreme Court, Civil Chamber, Section 1a, 2010, p.8)

Another judgment of the Supreme Court, Civil Chamber, in addition to the nature of the right of public communication and retransmission of works, previously mentioned, specifies the clear and total difference between the authorizations given to a broadcasting organization for the first broadcast of the broadcast contents and the necessary authorization for the retransmission of such contents by retransmitting the signal containing them. Likewise, it reiterates what has already been stated in this brief in reference to the differentiation of authors’ rights with respect to audiovisual works and related rights relating to broadcasting organizations: “What the norm intends is that the exclusive right that could be held by the television broadcasting entities does not completely and absolutely eliminate the rights of the authors themselves (...) the appellant’s thesis that a work by the fact of being included in a program that will later be broadcast by a television entity loses all identity and specificity is unsustainable” (Antequera Parilli, 2002).

According to that review, it can be established that the figure of “Must Carry” has been regulated in different jurisdictions and there is a clear differentiation between the regulatory scope of television (open or closed) and the scope of copyright protection in the legislations of the studied countries.

Another aspect to highlight is that “Must Carry” does not and should not affect copyright. The contrary would be a contradiction with the objective of the policy itself, which seeks to favor local production of content and guarantee its dissemination.

The broad development of the concept of communication to the public in law has made it possible to establish that in the case of the retransmission of works protected by copyright, the simple fact that the retransmission is made by an entity other than the one from which the signal containing the protected works originates, implies a new communication to the public.

Case law in the different jurisdictions abounds in applying the principle of independence of rights, so that the authorization for the broadcasting of works does not imply either an exhaustion of the right of public communication, or an implicit authorization to retransmit such works.

It is also clearly accepted that the related right of the broadcasting organization is different from the copyright in the works contained in the broadcast signals. Therefore, it is not possible to validly claim or allege that if the broadcasting organization authorizes the retransmission of its broadcasts containing copyrighted works, this implies an authorization for the retransmission of such works. They are, simply, different rights and different right holders.

## CONCLUSIONS

From an analysis of article 11 of Law 680 of 2001, it can be understood that there is no limitation or exception to copyright. Rather, it is an imposition by the State on subscription television operators by reason of the concession of the operation of a part of the radio electric spectrum over which it exercises dominion. It is, in addition, in accordance with the provisions of section 2 of this article, a mechanism used to promote free access under equal conditions to the entire population of the country. In this sense, from the text of the norm, as well as from the subsequent norms emanating from the Colombian television regulatory agency, there is no evidence of authorization for the cable television operator to carry out the retransmission; on the contrary, it imposes this charge on it.

Additionally, we may point out that the copyright on the works that are communicated to the public by means of broadcasting organizations is different from the related right of the broadcasting organization. Therefore, the authorization to retransmit the broadcasts of the broadcasting organization does not include the authorization to retransmit the works contained in the retransmitted broadcasts. The foregoing finds support in national and Andean legislation and in the framework of other jurisdictions that have studied the subject. In this sense, this conclusion can also be established as a *acte clair* within the framework of the case law of the TJAC.

It can also be understood that it is an *acte clair* within the framework of the TJAC case law that being the retransmission an act of public communication, it is subject to the prior and express authorization of the author or copyright holder of the retransmitted work. Thus, it is irrelevant that the retransmission made by the subscription television operator is given in compliance with a legal mandate, since such mandate does not incorporate in any way a limitation or exception to such right of the authors.

Whenever the retransmission is made by an organization or entity different from the one that originates the retransmitted signal, it will be a new and different act of communication to the public of the work, and therefore it must be previously and expressly authorized by the author or the owner of the right over the retransmitted work.

Finally, the authorization for the communication of audiovisual works that may have been granted to the broadcasting organization of origin of the signal that is then retransmitted, is separate, independent, and therefore does not include and cannot be extended to the retransmission that the subscription television operator performs.

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