

AUDIOVISUAL SECTOR COALITION COMMENTS

on the proposed Regulation extending the application of the Country of Origin principle and on the draft CULT opinion by Mrs. Kammerevert

ACT Association of Commercial Television in Europe



cepi.tv

EUROCINEMA
Association de producteurs de cinéma et de télévision

EUROPA DISTRIBUTION

EUROPA INTERNATIONAL



FIA
INTERNATIONAL FEDERATION OF ACTORS
FEDERATION INTERNATIONALE DES ACTEURS

FIAD
INTERNATIONAL FEDERATION OF FILM DISTRIBUTORS' ASSOCIATIONS



Federation of screenwriters
EUROPE

Independent Film & Television Alliance

IVF
INTERNATIONAL VIDEO FEDERATION
Publishers of Audiovisual Content on Digital Media and Online



SPIO
Spitzenorganisation der Filmwirtschaft e.V.

UN media, entertainment & arts
global union

UNIC
Union Internationale des Cinémas
International Union of Cinemas

CLAIM 1: COUNTRY OF ORIGIN (COO) DOES NOT AFFECT TERRITORIALITY

“Lastly, the text stresses once again that the aim is not to render the principles of territorial exploitation of rights or contractual freedom null and void.” (Mrs. Kammerevert’s draft opinion)

REALITY 1: THE TERRITORIAL NATURE OF COPYRIGHT IS REMOVED

The proposed Regulation extends and mandates the principle of Country of Origin to “ancillary online services” of broadcasters, by stating that the acts of communication to the public and of making available “are deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment”. This means that, when a broadcaster makes available catch-up or simulcasting services online in EU Member States without geo-blocking, broadcasters would not be infringing copyright law even if they only acquired or cleared the rights for the Member State of establishment (“buy 1, get 28”). The proposed Regulation therefore effectively removes the territorial nature of copyright in this context by creating an automatic pan-European license where in effect the geographical scope of the license extends beyond the Member State of establishment of the broadcaster. In addition, the EU competition authorities are – in parallel – investigating contractual arrangements between right holders and broadcasters. Their focus is on whether contractual clauses limiting the availability of a pay-TV service to a given

territory infringes EU competition law. As a result, it is very likely that the contractual opt-out in Recital 11 could be severely limited by the application of EU competition law.

- Pan-European licensing would have negative effects on the production and distribution of film and other audiovisual content throughout Europe. Due to the resulting market concentration in terms of distribution (see below), competition will be reduced and consumers are likely to pay a higher price for content and suffer the consequences of a loss of cultural diversity, both in terms of content and services offered.
- EU producers, distributors and broadcasters are dependent on territorial licensing in order to raise financing to produce content and to market and distribute it to future audiences. De facto pan-EU licensing would reduce opportunities for them to continue to do so:
 - It would diminish their profit margins, impair their ability to reinvest revenues in new original content and affect co-production opportunities between business partners from different Member States. The ability to recoup development, production, marketing and distribution costs would be negatively affected and the entire sector's ability to recoup investments in existing content and develop, produce, market and distribute new content would be severely harmed. This would particularly be true for European film and drama, extremely dependent on local promotion and distribution. If the local exploitation of this European content on every support is impaired, it would have a negative impact on their circulation in Europe.
 - Producers and creators of film, television programmes, news and local content would see investments dwindle as they directly depend on broadcasters for the financing of this content.

The unintended consequences of abolishing the ability for rights owners and licensees of AV content to agree to exclusivity of rights licensing on a territorial basis and to agree to achieve this by way of geo-blocking would be far-reaching as follows:

- Faced with the likely outcome of many non-exclusive pan-EU licenses generating less recoupment of production costs, producers of high-value content (sport, film, high-end drama and entertainment) will sell rights on a pan-EU basis, which smaller national platforms will be unable to afford. There will also be a disincentive to offer content for online distribution at all due to the right holders' inability to ensure that exclusive territorial licenses are not compromised.
- Should licenses move to a pan-EU model, they are unlikely to be acquired by local domestic operators. The main beneficiaries will be larger content aggregators who offer content in the main European languages, particularly English. There is a real risk that smaller markets and less-widely spoken languages will be marginalised, leading to a reduction in consumer choice online as consumers will be increasingly serviced by pan-EU international platforms. National online offerings - only able to secure content rights with no wider international appeal - would be impoverished and European content availability will decrease. Digital innovation will decline as online rights become harder to secure.
- News and local programming is expensive to produce and is financed with returns broadcasters secure from high-value content. In a scenario where only larger content

aggregators would be able to acquire rights to high-value content, the ability for local broadcasters to invest in news and local programming will be negatively affected.

- As rights would increasingly be sold to pan-EU platforms for pan-EU distribution, funding by co-production and/or pre-selling exclusive distribution rights for European film and television production and co-productions will decline. This will mean fewer and less well-funded European productions with a resulting negative effect on cultural and linguistic diversity. A move to a pan-EU model with a single price applied across the EU may well result in price increases for many territories, particularly for premium content. These concerns are effectively confirmed by the European Commission in the Impact Assessment:

“Options which, in addition to establishing the CoO rule, would prohibit contractual arrangements concerning territorial exploitation of content were discarded. Such options could de facto result in pan-European licences. Many operators, including SMEs, may not have financial means to acquire pan-European licences. If the market does not have a possibility to adapt to changes gradually such options could push smaller operators out of this segment of the market. Also, such options may impact the way how the creative, especially AV, content is financed and distributed.”¹

The negative impact on consumers has also been analysed by economists:

“Perhaps counter-intuitively, a total ban on territorial licensing might decrease, rather than increase, consumer choice. First, because the ability of the original rightholders to efficiently extract the rents generated by their content in the retail markets might decrease, they could have weaker incentives to invest in the production of new content which would then in turn decrease the availability of new content for consumers. Second, a scenario is possible where the price for access to content in some territories might increase (while it might decrease in other territories). This would be the case, for example, when a ban on territorial licensing limits the scope for price discrimination. If, as a result, prices become prohibitively high for some national markets, they might not be served. This suggests a cautious approach in implementing the objectives of Internal Market.”²

Extending the CoO principle to the online environment is therefore not a viable solution for the European audiovisual industry and would be detrimental to EU consumers, economic growth and jobs. We are concerned that, even without the detrimental amendments in the draft Kammerervert opinion, the freedom to licence supposedly secured by the Commission’s proposed Regulation, is illusory because of the lack of bargaining power of producers vis-à-vis public service broadcasters when negotiating catch-up licenses together with financial investment by the same broadcasters in the content in question. In addition, the outcome of ongoing EU competition law investigations could further affect licensing freedom to agree on territorial rights licenses in this context.

CLAIM 2: ALL ONLINE SERVICES PROVIDED BY BROADCASTERS SHOULD BE INCLUDED IN THE SCOPE OF THE COO REGULATION

The draft Kammerervert opinion extends the scope of CoO to all broadcasters’ online services (amendment to Article 1 – paragraph 1 – point a) using the following justification:

¹ IA, p. 27

² [Economic Analysis of the Territoriality of the Making Available Right in the EU](#), Charles Rivers Associates, March 2014, p. 2

“Your rapporteur takes the view that an online service's relationship to a broadcast has no bearing on the issue of its assignment to a copyright licensing system, and that it does not matter whether or not an online service is ‘ancillary’”

REALITY 2: THE COO PROVISIONS SHOULD SIMPLY BE DELETED

The European Commission has insisted that its proposed Regulation will “only” affect limited forms of use which it considers ‘ancillary’ such as **catch-up TV**. This is a misconception. From a commercial standpoint, there is nothing ‘ancillary’ about catch-up services; they are now primary to the reach of most broadcast content and to its value. In reality, catch-up is where a fast growing proportion of TV viewing is migrating in many EU markets: catch-up is many European viewers’ preferred access to TV programming, including in many instances film and drama. As a consequence, the financial value of primary television licenses is substantially linked to catch-up services and the two sets of rights are negotiated in a single transaction.

There is nothing “ancillary” about simulcast either. For sports which are consumed live, simulcast represents a growing part of the content’s value.

By proposing that **all online services provided by broadcasters should be included in the scope of the COO provision**, Mrs. Kammerevert’s suggestions exacerbate those outstanding concerns and would cripple right holders’ ability to derive economic value for either television or online rights to their works.

In addition, there is no credible reason to support extension of the scope of the CoO provision to such online services. The recommendation to do so is based upon the unfounded assumption that broadcasters face higher transaction costs when clearing cross-border rights compared to local rights clearance. The lack of data supporting this assumption is acknowledged by the European Commission in the IA:

“However, despite requests, neither EBU nor the Association of Commercial Television in Europe (ACT) provided data on cross-border transaction costs for clearing online rights, as compared to transaction costs in one jurisdiction.”³

The fact is that broadcasters do not face additional transaction costs when clearing cross-border rights compared to clearing the rights locally. This is because the exclusive exploitation of rights for an audiovisual work is typically aggregated in the hands of a single licensing entity:

“Transaction costs faced by audiovisual service providers are alleviated by the fact that, unlike in the music industry, the exclusive exploitation rights in an audiovisual work are typically aggregated in the hands of a single licensing entity (...). As a consequence, service providers making an audiovisual work available online can clear the required exclusive rights in that work within a single transaction.”⁴

Absent a justification for the extension of CoO to all broadcasters’ online services and taking account of the significant detrimental effects on consumers, businesses, cultural diversity and jobs in the EU’s AV sector (as explained under REALITY 1), the CoO provision (Article 1(a), 2 and 5) should be deleted.

³ IA, p. 20, footnote 70.

⁴ [Economic Analysis of the Territoriality of the Making Available Right in the EU](#), Charles Rivers Associates, March 2014, p.96, also invoked in the IA, p. 14, footnote 35.

Signatories

ACT - Association of Commercial Television in Europe, *Grégoire Polad, Director General* - gp@acte.be, and *Emilie Anthonis, Director of Legal and Public Affairs* - ea@acte.be

CEPI - European Coordination of Independent Producers, *Elena Lai, Secretary General* - Cepi@europe-analytica.com

EUROPA DISTRIBUTION - European Network of Independent Film Distributors, *Christine Eloy, General Manager* - christine.elay@europa-distribution.org

FERA - Federation of European Film Directors, *Pauline Durand-Vialle, CEO* - pdv@filmdirectors.eu

FIAD - International Federation of Film Distributors Associations, *Nikolas Moschakis, Secretary General* - nikolas.moschakis@fiad.eu

FSE - Federation of Screenwriters in Europe, *David Kavanagh, Executive Officer* - david.kavanagh@script.ie

IVF - International Video Federation - Publishers of Audiovisual Content on Digital Media and Online, *Charlotte Lund Thomsen, Legal Counsel* - clthomsen@ivf-video.org

MEDIAPRO - *Jaume Roures, Legal Representative Mediaproducción S.L.U.*, jroures@mediapro.es

Premier League - *Mathieu Moreuil, Head of European Public Policy* - mmoreuil@premierleague.com

UNI-MEI - Uni Global Union Media Entertainment and Arts, *Johannes Studinger, Head* - Johannes.Studinger@uniglobalunion.org

BUNDESLIGA - *Stefan Brost, Head of EU Office* - stefan.brost@dfb-dfl.de

EUROKINEMA - Association de Producteurs de Cinéma et de Télévision, *Yvon Thiec, General Delegate* - Yvon.Thiec@eurocinema.eu

EUROPA INTERNATIONAL - *Daphné Kapfer, Managing Director* - info@europa-international.org

FIA - International Federation of Actors, *Dominick Luquer, Secretary General* - DLuquer@fia-actors.com

FIAPF - International Federation of Film Producers Associations, *Benoît Ginisty, Director General* - B.Ginisty@fiapf.org

IFTA - Independent Film & Television Alliance, *Jean Prewitt, CEO* - jprewitt@ifta-online.org

LaLiga - The Spanish Football League, *Javier Tebas, President* - contact: *Laura Vilches* - lvilches@laliga.es

MPA - Motion Picture Association, *Stan McCoy, President and Managing Director MPA EMEA* Stan_McCoy@mpaa.org

SPIO - Spitzenorganisation der Filmwirtschaft (Association of the German Film Industry), *Alfred Holighaus, President* - holighaus@spio.de

UNIC - International Federation of Cinemas, *Jan Runge, CEO* - jrunge@unic-cinemas.org