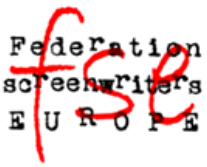
Joint Position on the Country-of-Origin Aspects of the Online Broadcasting Regulation

February 15, 2018



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As key representatives of the audiovisual sector in Europe, we share a determination to preserve and strengthen Europe's extraordinary cultural diversity, professional and quality content, a dynamic independent sector and a large choice of digital services offering such content to European consumers on-demand through multiple distribution channels.

It is in our collective interest – as an industry and as European decision-makers – to safeguard territorial exclusivity beyond the recently adopted Portability Regulation and to preserve the value of rights in the audiovisual sector in Europe. This way, we ensure that the mechanisms for creating, funding and producing, marketing and distributing creative and culturally diverse content in Europe continue to thrive.

The underlying rationale for the introduction of the country-of-origin ("CoO") principle in the proposed Online Broadcasting Regulation (the "Regulation") remains highly questionable: there is no meaningful demand for cross-border availability of audiovisual content justifying regulatory intervention[1]. The allegation that it is too burdensome to obtain licenses for copyright and related rights to make content available online across borders is unsubstantiated. On the contrary, the negative impact of erosion of territorial exclusivity on cultural diversity, employment, sector sustainability and ultimately consumer choice is likely to be significant as evidenced by independent economic research[2] - research which none of the EU institutions have sought to negate.

Elements for consideration in the trilogue negotiations

The European Parliament well understood the immense risk of the CoO aspects of the Regulation for the audiovisual sector in Europe and confirmed, by a comfortable plenary majority across numerous political groups, a **balanced approach** which:

1. **Provides that the application of CoO licensing is an absolute exception** contrary to the setting of CoO as the default regime for the delivery of copyright protected content on demand, through a number of online services. CoO as the default approach would be contrary to the fundamental principle of territoriality of copyright enshrined in international and EU law, thus compromising the basis for the development, financing, production and distribution of audiovisual content and the long-term sustainability of the audiovisual sector in Europe.

2. **Limits the application of CoO to 'news and current affairs' programme** as opposed to programmes 'fully financed and controlled' by the broadcaster[3]. While this additional language may have been intended to limit the scope of the default application of CoO licensing mentioned above, this approach would unquestionably lead to attempts to bring more productions than intended into this ambiguous category, with the likely market default position being no exploitation rights left with the producer. The already weak bargaining position of producers when negotiating with large publicly-funded broadcasters for the development, creation and production of TV programmes would thus be further eroded. In addition, the recoupment of creative development costs, often

[1] European Commission 2015 Eurobarometer: only 5% of Internet users tried to access audio-visual content through online services meant for users in other Member States, while nine out of ten respondents said that they were able to find the content they are looking for online.
[2] The Impact of Cross-border Access to Audiovisual Content on EU Consumers, 2016.
[3] Doc. 15898/17 – Council of the European Union.

incurred by independent producers and their creative partners would be jeopardized, as the producer will have little choice but to release all exploitation rights in order to get the programme financed and produced.

- In this context, we note that **attempts to give interpretive guidance to the concepts of "fully-financed and controlled"** (see Recital 9b[4]), **would only further aggravate the imbalance in the market place**. By suggesting that public funds and/or financing may count towards a production being considered as 'fully financed and controlled,' the creative, development and financing initiative will be separated from the producer[5] and the value of production will be further concentrated within public service broadcasters. As a result, the increased pressure on independent producers to accept full 'buy-out of rights' contracts will weaken creativity, entrepreneur ship and private sector risk-taking in the audiovisual sector.

3. **Preserves a definition of the 'ancillary' services to which CoO licensing would apply, as having a clear subordinate relationship to the broadcast and not being provided separately**. It is important to avoid expansion to services that are "bundled with or provided separately from a broadcast service," since both catch-up services and stand-alone on-demand online services represent significant and growing commercial importance and value. Right holders should therefore retain full commercial freedom to decide on the appropriate licensing scheme. **We support the narrowest possible definition of 'ancillary' services in the Regulation.**

CoO, territorial licensing and interface with EU competition law and Art. 56 TFEU

The assertion continues to be made that the proposed CoO principle would only provide for a default rule that contractual parties can freely choose to contract out of – this is an empty promise. There is a fundamental **interaction between the CoO principle and the application of EU competition law and internal market rules,** as currently investigated by DG COMP in the Pay-TV case. The application of the CoO principle would remove the copyright justification for the territorially exclusive licensing of the content concerned under competition law and Article 56 TFEU. Broadcasters' own commercial freedom to meaningfully protect exclusive territorial exploitation in their capacity of broadcasters would be compromised, forcing them to provide access to their services from all other EU Member States.

We stand behind the principles determining the Parliament's approach of safeguarding maximum private sector investment in the development, creation, production and distribution of original EU content. This approach will allow the audiovisual sector to be able to continue to offer diverse and quality content at affordable prices on multiple local online platforms in various Member States.

We therefore urge European decision-makers to safeguard the territoriality of copyright by adopting the narrowest possible application of the CoO principle – as an exception, not the default rule – limited to the licensing of 'news and current affairs' content. We further urge you to preserve the narrow definition of 'ancillary services' proposed by the European Commission and the European Parliament.

[4] Doc. 15898/17 – Council of the European Union.

[5] Public funds are often accessed through producers. Many of the relevant funding mechanisms also provide for a reversion of rights to the producer after a period of time. The application of CoO licensing to the content concerned would exhaust the commercial value of those rights before they revert to the producer.

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