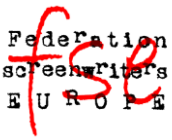
AUDIOVISUAL SECTOR COALITION COMMENTS

on the on the proposed Regulation extending the application of the Country of Origin principle and on the draft IMCO opinion by Julia Reda MEP



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

"The country of origin (COO) principle is the backbone of this Regulation, which is crucial in a single market and for the cross-border distribution of content. It does not affect the territoriality of copyright or the scope of licences in a sector. It only establishes under which jurisdiction the relevant act under copyright law takes place and simplifies the regulatory regime for broadcasters. Therefore, no provisions on territoriality or licencing are necessary". (draft Reda opinion p.3)

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.

- 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.

    - 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.

CLAIM 2: CONTRACTUAL PROVISIONS ON PASSIVE SALES (= GEO-BLOCKING) SHOULD BE VOID

The draft Reda opinion deletes Recital 11 on contractual freedom and introduces a new Recital 14a and Article 4a stating that agreements imposing passive sales restrictions (i.e. geo-blocking obligations) on broadcasters shall be automatically void. By doing so, the draft Reda opinion tries to pre-empt the considerations of DG COMP in an ongoing case and the final report on the ecommerce sector enquiry and extends its potential effects to all market players, including those who are not a party to the case.

REALITY 2: GEO-BLOCKING IS ESSENTIAL TO ALLOW FOR CONSUMER CHOICE AND ACCESS CONDITIONS ADAPTED TO LOCAL MARKET CONDITIONS

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. 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 increasing 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 Reda 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 contractual freedom to agree on territorial rights licenses in this context.

[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

CLAIM 3: ALL ONLINE SERVICES PROVIDED BY BROADCASTERS SHOULD BE INCLUDED IN THE SCOPE OF THE COO REGULATION

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

"Difficulty in rights clearance for broadcasters is due to the large number of involved rights holders, similar issues are faced by providers of webcasting or other online-only offers. At the same time, the fulfilment of the mission of public service broadcasting in particular requires that it continue to benefit from technological progress, which requires them to use all channels to reach different audiences, especially youth. Therefore the Rapporteur is of the opinion that all online services provided by broadcasters should be included in the scope of the COO provision." (draft Reda opinion p.3)

REALITY 3: 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. Reda'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 (the producer):

"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

[3] IA, p. 20, footnote 70.

in the hands of a single licensing entity, the producer. (…) 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 and 2), the CoO provision (Article 1(a), 2 and 5) should be deleted.

CLAIM 4: NEED FOR A REVIEW CLAUSE

The draft Reda opinion foresees a review clause (in Article 6 – paragraph 2 a (new)) to consider the effectiveness of an even wider extension of the scope of the CoO principle to VOD platforms.

REALITY 4: NO NEED FOR A REVIEW CLAUSE

As explained above, the extension of CoO to any online exploitation of AV content will have detrimental effects on consumers, businesses, cultural diversity and jobs in the AV sector. A review clause would create further unnecessary uncertainty in a market that is currently going through heavy EU regulatory intervention (AVMS Directive, Portability Regulation, Broadcasters' Regulation, Copyright Directive,…) and transitioning to new delivery models.

[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.

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