

DRAFT ONLINE BROADCASTING REGULATION:
AUDIOVISUAL SECTOR REFLECTIONS ON
THE DISCUSSIONS IN THE COUNCIL ON ARTICLES 1, 2 AND 6

September 26, 2018



As key representatives of the audiovisual sector in Europe, we share a determination to safeguard territorial exclusivity and to preserve the value of exclusive rights in the audiovisual sector in Europe. Our objective is to ensure that the mechanisms for creating, funding and producing, marketing and distributing creative and culturally diverse audiovisual content in Europe continue to thrive.

We are writing to you in the context of the ongoing Council discussions to express our strong and ongoing concerns with:

1. **The proposed review clause (Art. 6)**¹: In a departure from conventional review clauses in EU legislation², the proposed text is biased toward a future extension of the country-of-origin (CoO) principle over and above the types of programmes stipulated in the Regulation. This would conflict with the application of the CoO principle as an absolute exception to the fundamental principle of territoriality of copyright enshrined in international and EU law. The biased approach of the review clause severely compromises the basis for the development, financing, production, and distribution of audiovisual content and the long-term sustainability of the audiovisual sector in Europe. Moreover, the proposed review clause clearly disregards the time span actually needed for the Regulation to take effect in the marketplace and thus for an appropriate assessment of its impact. **We therefore strongly urge you to oppose the review clause as discussed in the Council.**
2. **The scope of the CoO principle (Art. 2)**: We continue to have the strongest concerns with the proposed broad scope of application of the country-of-origin principle set out in Art. 2 as discussed in the Council: this would include programmes ‘related to news and current affairs’ as well as programmes ‘produced by a broadcasting organisation’. Despite attempts to mitigate the harmful impact of this broad application of the CoO principle³, the proposed language would further reinforce the stronger market position of public service broadcasters vis-à-vis independent producers and prejudice the latter’s ability to retain rights in the projects which they develop and produce and thus their ability to build IP capital and catalogues of works in their production companies. Producers will be reduced to “servicing entities” for public service broadcasters rather than actual partners in the development, production, and financing of the project concerned - the role which they play today. Contrary to the objective of the Digital Single Market strategy to make EU businesses competitive at a global level, the CoO principle will deprive independent production companies of their very IP/rights assets and their independence, with negative consequences for their capacity to invest in other projects not involving public service broadcasters. As a dynamic and entrepreneurial sector, independent production plays a vital role in fostering competition in the marketplace for rights in audiovisual content in Europe, with attendant benefits to European audiences in terms of cultural diversity, quality of content and access choices.

¹ “. . . the Commission shall assess the need to extend the application of Article 2 [scope of the country-of-origin principle] to programmes other than those referred to in that Article . . . “. (emphasis added)

² See e.g. the Commission’s original proposal COM(2016) 594 final: “. . . the Commission shall carry out a review of this Regulation and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee”.

³ See proposed Recital 9b which would include in the scope of the CoO principle a wide range of productions including those carried out by broadcasting organisations’ commercial subsidiaries.

At the same time, the distribution of European works would be negatively affected: distributors would no longer be able to purchase exclusive local licenses for works considered as “produced by a broadcasting organisation” under the Regulation. Without territorial exclusivity, distributors would see a deterioration of the value of local licenses for European works as the very same content will already have been made available via an online ancillary cross-border service. Distributors may well decide not to buy such licenses at all. Moreover, the loss of incentives for local distributors to purchase and market European works resulting from the erosion of territorial exclusivity will reduce – rather than encourage - the circulation of such works in the European Union.

We continue to disagree 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. Broadcasters' own commercial freedom meaningfully to protect exclusive territorial exploitation of their services would be compromised, forcing them to provide access to their content and services from all EU Member States – a development which they consider undermines the viability of their business model.

We therefore continue to support the narrowest possible scope of application of the CoO principle.

3. **The definition of ‘ancillary’ services (Art. 1(a):** We urge you to ensure that the ‘ancillary services’ to which the CoO principle would apply have a clearly subordinate relationship to the primary broadcast and are not provided separately as ‘stand-alone’ services. It is important to avoid including 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 continue to support the narrowest possible definition of ‘ancillary’ services in the Regulation.**

We continue to urge you to safeguard the territoriality of copyright by opposing a biased review clause and by adopting the narrowest possible application of the CoO principle – as an exception to the fundamental principle of territoriality of copyright. We further urge you to preserve the narrow definition of ‘ancillary services’ proposed by the European Commission and the European Parliament.

Signatories

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