Letter from the Audio-Visual Sector Coalition

Main reasons why the Country-of-Origin provisions in the Proposed Broadcasters' Regulation (the Proposal) must be deleted

ACT Association of Commercial Television in Europe

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Association de producteurs de cinéma et de télévision

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Federation screenwriters EUROPE

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IVF
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Publishers of Audiovisual Content on Digital Media and Online

LaLiga

MEDIAPRO

MPA MOTION PICTURE ASSOCIATION EUROPE, MIDDLE EAST AND AFRICA

Premier League

SPIO
Spitzenorganisation der Filmwirtschaft e.V.

UNI media, entertainment & arts global union

UNIC
Union Internationale des Cinémas
International Union of Cinemas

vprt
Association of Commercial Broadcasters and Audiovisual Services

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The entire audio-visual sector ranging from writers, directors, performers, skilled professionals through all business partners in production, marketing and distribution have been very clear and vocal (see Annex) in expressing their position since the beginning of the debate around the application of the Country of Origin (CoO) principle to broadcasters' ancillary online services: **The relevant provisions (Articles 1.1a, 2 and 5 as well as Recitals 8-11, 15) must be deleted.** The proposals on CoO will not achieve the stated goals and will act to the detriment of consumers and the industry alike. Our position is not the consequence of an unwillingness to compromise or conservatism – rather, it is based on rational arguments that are all, considered individually, and certainly combined, reason enough to delete the above mentioned relevant provisions.

1. CoO does not reduce transaction costs for broadcasters:

The so-called problem identified by the European Commission ("EC") to justify the introduction of the CoO principle to the licensing of ancillary online services to a broadcast is the "high transaction costs for the acquisition of rights for their online services when they are offered across borders"[1]. However, the EC's impact assessment acknowledges that the EC has no data to verify this assumption[2] and that even the relevant stakeholder(s) (e.g. the EBU, representing public service broadcasters) most vocal in calling for EC action in this field, has not been able to provide any data on cross-border transaction costs for clearing online rights, as compared to transaction costs in one jurisdiction.

In reality, applying the CoO principle would not reduce broadcasters' transactions costs as explained by Professor Jan Bernd Nordemann (Honorary Professor, Humboldt University Berlin) at a recent workshop organised by the European Audiovisual Observatory at the request of the Commission:

> "He concluded that *transaction costs would not be reduced with the application of the COO principle,* as territorial rights are just one cost factor out of five. In addition, the rights are more expensive if acquired on a more extensive territorial basis, or they may not be available." (summary of the EAO workshop of 21 June 2017 p. 16, par 2)

This is confirmed by the **2014 CRA study**[3] that also found only small or negligible transaction costs for broadcasters as the exclusive exploitation of rights for an audio-visual work are typically aggregated in the hands of a single licensing entity: the producer.

Conclusion: Absent any data and (verified) justification for the introduction of the CoO principle, the relevant provisions should be deleted in accordance with the requirements of the Better Regulation Guidelines[4], as the obligation to provide quantitative and qualitative analyses has clearly not been fulfilled. Providing a "buy one, get 27 on top" benefit to (public service) broadcasters (see point 2 below) is not a valid justification – particularly in light of the negative consequences for producers, distributors,

[1] Impact Assessment, p. 24.
[2] IA, p. 21.
[3] Economic Analysis of the Territoriality of the Making Available Right in the EU, Charles River Associates, March 2014, p.96, also invoked in the IA, p. 14, footnote 35.
[4] Better Regulation Guidelines. 19.05. 2015

sport event organisers, authors, performers and other creative talent across the European audio-visual sector as well as for consumers[5].

2. CoO would erode territorial exclusivity with no commercial freedom for rights owners

The audio-visual industry has argued consistently that CoO would interfere with the territorial-exclusive nature of copyright. This would result in an erosion of meaningful territorial licensing and with that remove the commercial freedom of rights owners to raise financing to develop, produce, market and distribute films and other audio-visual content. This is so for the following reasons:

- CoO would stipulate as a default rule that it is sufficient to clear rights in 1 Member State, even if the content is made available on a pan-EU basis (the "buy 1, get 27 on top" principle);
- The EC has argued that – even though the territorial nature of copyright is affected by CoO – it is possible to address the negative effects of the *de facto* pan-EU license by contract (see Recital 11 of the Proposal).
- This argument is fundamentally flawed:
    - Without the proposed application of CoO, the broadcaster has to explicitly negotiate the desired territorial scope of the rights (opt-in system). With the proposed application of CoO, the producers would have to explicitly negotiate a limitation of the licensed territory (opt-out system, i.e. negotiate down from covering the entire EU to e.g. a single territory). This assumes, incorrectly, that producers have the requisite bargaining power to convince broadcasters to forego automatic pan-EU CoO rights. The commercial value of online catch-up rights which increasingly are European audiences' preferred access to TV programming and the fact that catch-up rights are licensed together with primary TV rights, only compounds the imbalance in bargaining power between producers and broadcasters[6].
    - Application of competition law: Exclusive territorial licensing legally is not as such considered restrictive of competition[7]. The imposition of the CoO principle would remove this important legal justification. Hence, while the EC argues that the proposed CoO would not oblige (but only facilitate) broadcasters to make available the works covered across borders, competition law experts, such as Professor Ibáñez Colomo (Competition law professor at the London School of Economics and College of Europe), are of the opinion that this is not the case and that it is reasonable to infer from the *Murphy*-case[8] that the introduction of the CoO principle would challenge measures to ensure meaningful territorial licensing – as it could no longer be justified by the territorial nature of copyright.

- The EC has often (but not always) denied the interplay between the CoO principle and the commercial freedom to license full territorial exclusivity. In practice, however, as Professor Pablo Ibáñez Colomo has observed[9]:

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[5] The impact of cross-border access to audiovisual content on EU consumers, Oxera and O&O, May 2016.

[6] Contrary to the situation at the time of the adoption of the Cable- and Satellite Directive where satellite rights represented a more modest part of the exploitation of a particular title.

[7] See *Coditel II.*

[8] Joined Cases, C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd* ("*Murphy*"), EU:C:2011:631, para 137.

[9] https://antitrustlair.files.wordpress.com/2017/06/ibanez-colomo-copyright-reform-against-the-background-of-pay-tv-and-murphy.pdf

- If the EC adopts a prohibition decision in the Pay TV case concluding that the agreements at issue are restrictive by object and cannot be justified under Article 101(3) TFEU, it is reasonable to presume that all similar agreements concluded by other broadcasters and content providers would also be contrary to Article 101 TFEU.
- Even if the EC does not intend to take action against other broadcasters or content providers, national courts and competition authorities may enforce against them on the basis of the findings of the Pay TV case.
- References to contractual freedom in the Proposal do not change this conclusion – as primary EU law would in any event take precedence over the Regulation, if eventually adopted.

As a result of the introduction of CoO, many broadcasters would no longer be able to obtain exclusive licenses from producers for content with international appeal. The only winners would be large international platforms, which are not necessarily best suited to promote the European cultural industries and European cultural diversity and respond to the needs of local audiences.

Conclusion: The so-called 'contractual' freedom to opt out of the CoO principle is an illusion because of the interplay with EU competition law and because of lack of bargaining power on the part of producers. The resulting erosion of territoriality and the impact on the ability of producers of content to license on an exclusive territorial basis will adversely impact financing, production, distribution and availability of works in Europe, and have a negative effect on cultural and linguistic diversity as well as on consumer welfare[10].

3. Reducing the scope of CoO to certain kinds of production/ genres is not a solution

The same concerns apply to any attempts to mitigate the harmful impact of the Proposal by reducing the scope of application of the default CoO principle to so-called 'commissioned', 'fully-financed', 'co-' or 'own' productions. While such amendments to Article 2 of the Proposal would arguably limit the scope of application of the CoO principle, they would still negatively affect many productions and cannot cure the fundamental harm caused by removing the territorial nature of copyright. In a nutshell:

- Excluding certain productions from the scope of application still keeps CoO as a default rule. That means that the burden of proof that a certain production does not qualify as a 'commissioned', 'fully-financed', 'co-' or 'own' production lies with the producer/right holder.
- The terms 'fully financed', 'commissioned', 'purchased' or 'own' productions are not harmonised legal terms – nor should they be. In each Member State, these concepts differ, depending on local regulations, terms of trade, and basically the commercial viability of each individual project. Introducing these terms into a Regulation would lead to large scale legal and business uncertainty.
- Moreover, co-productions and/or commissioned content often involve a territorial split of the distribution rights between the broadcaster and the producer as part of the contractual arrangements governing the sharing of responsibilities, financing and future recoupment. Applying the CoO principle to such cases would expropriate the producers' benefits under such an arrangement. European film and drama will be particularly at risk as they rely on co-production

[10] Economic Analysis of the Territoriality of the Making Available Right in the EU, Charles River Associates, March 2014; The impact of cross-border access to audiovisual content on EU consumers, Oxera and O&O, May 2016.

schemes which require partners to pull together resources by agreeing to focus their activities on specific markets.

- Even if it were possible in a legally and commercially sound manner to define a pure broadcaster-owned production, in which producers have no rights, as seems to be the idea behind the notion of a "broadcasters' own production", subjecting these to the CoO principle would still devalue these productions from a broadcaster perspective, as broadcasters would not be able to grant meaningful territorial exclusivity in licenses with other territories (see above on the interplay with competition law). This would, in turn, significantly decrease the (commercial) broadcasters' ability to re-invest in new content.

Conclusion: A limitation of scope to certain productions, even if "fully financed"/ "broadcasters' own productions", does not alleviate the core concerns with regards to the erosion of territorial exclusivity and removal of commercial freedom.

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