

ACT POSITION ON BROADCASTERS REGULATION

On 14 September the Commission published a [Proposal](#) for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations (the Proposal). The Proposal extends certain principles of the 1993 Satellite and Cable Directive¹ (the Directive) to the online environment. ACT supports the Commission's DSM objectives, but we do not believe that extending the principles of the Directive to the online environment will result in more cross-border availability of AV content. On the contrary, this extension will have negative consequences on European production, financing and distribution, in particular putting European broadcasters at a disadvantage and creating an imbalanced digital ecosystem.

Country of Origin

Article 2 of the Proposal extends 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 implies that, when a broadcaster makes available catch-up or simulcasting services online without geoblocking, they would not be infringing copyright law, even if they only cleared the rights for the Member State of establishment ("buy 1, get 28"). The Proposal therefore effectively removes the territorial nature of copyright in this context by creating an automatic pan-European license.

Broadcasters could be infringing their contractual terms however, should they have agreed with rightholders to limit the exploitation of the rights affected by the principle of country of origin by contract, as reminded by Recital 11 of the Proposal. Recital 11 might however have no practical effect, as the EU competition authorities are – in parallel with the Proposal – questioning contractual arrangements that impose geoblocking obligations on broadcasters.

The unintended consequences of this approach could be as far-reaching as follows:

- Faced with the likely outcome of many lower-fee non-exclusive pan-EU deals with a multitude of national platforms, rights owners of high-value content (sport, film, high-end drama and entertainment) will either sell rights on a pan-EU basis, which smaller national platforms will be unable to afford or withhold content from online distribution until exclusive national windows have expired across the EU (resulting in less content being available online in Europe);
- Should rights 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 are serviced increasingly by pan-EU international platforms. National online offerings would be impoverished, only being able to secure content rights with no wider international appeal. 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 get 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 seriously affected;

¹ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

- As rights are increasingly sold to pan-EU platforms for pan-EU distribution, multi-territory funding for European production will decline. This will mean fewer European productions and a greater market share for large-scale, global content produced outside of the EU;
- A move to pan-EU model with a single EU price may well result in price increases for many territories particularly for premium content such as high quality drama and US studio films of particular appeal to more than one Member State.

Extending the Country of Origin principle to the online environment is therefore not a viable solution for the European audiovisual industry and would be detrimental to EU consumers, economy and cultural diversity.

Retransmission

No need to extend the “cable regime” of mandatory collective management. Article 3 of the Proposal extends the mandatory collective management/cable regime of the Directive to the simultaneous unabridged retransmission of TV programmes on platforms other than the open internet (e.g. satellite, IPTV, mobile).

There is no need or justification for such an extension. The market for online services is steadily growing, facilitated by the communication to the public right (cf. article 3 of the 2001 Copyright Directive), without the imposition of mandatory collective licensing. Any further impingement on right holders’ rights and/or ability to have exclusive rights in a certain territory would limit investment in audiovisual works/online services and breach international norms².

The Broadcaster's Article 4 exemption must remain. At the very least, it is crucial to keep the broadcasters’ exemption from the obligation to exercise its own or its acquired rights via collective management. This is a key element in the Directive (Article 10). It enables broadcasters to retain control over the distribution of their programme services and as such is essential for the strategic development of the broadcasting/audiovisual industry.

Critically, broadcasters often fund the entire cost of high cost productions. The ability of the producer to license the rights to the content to a relatively limited number of (often exclusive) secondary users is key to the overall funding model. This small number of high value licences is a very different situation than is the case of underlying contributors e.g. music rightholders. The latter’s licences tend to be more commoditised; i.e. they are individually of lower monetary value per transaction/or licence and non-exclusive, but far more frequent and therefore more suited to collective management.

Any move away from the Article 4 exemption would transform broadcast content from a valuable commercial property into a commodity, thus:

- undermining the added value provided by an exclusive media partner. Particularly in terms of marketing and contextualising the content whilst scheduling and promoting it in an appropriate manner for rightsholders, creators and local audiences;
- disregarding the high risk nature of broadcasters’ investment in audiovisual content. Similar to the pharmaceutical sector, significant profits from relatively few star products are vital to cover other loss making investments.

Broadcasters (re)invest almost half of their revenue into original content and the Article 4 exemption is one of the drivers for this virtuous circle.

² Namely the WIPO Copyright Treaty (WCT), the WIPO Phonograms and Performances Treaty (WPPT) and the TRIPS agreement.

WHO WE ARE & WHY WE CARE

The Association of Commercial Television in Europe represents the interests of leading commercial broadcasters in 37 European countries. We entertain and inform hundreds of millions of EU citizens each week, delivering substantial value to EU citizens, for instance ensuring plurality in news provision as well as drama and sports to EU audiences. Europe's commercial TV's path to digitalization started 15 years ago, and we are now distributing TV according to our customers' preferences, whether that is digital terrestrial, digital satellite, cable or via stand-alone or multichannel networks online. We operate diverse digital business models that deliver unparalleled customer choice, varying from free-to-air advertising models to subscription on demand.

The ACT member companies finance, produce, promote and distribute content and services benefiting Europeans across all platforms. At ACT we believe that a healthy and sustainable commercial broadcasting sector has an important role to play in the European economy, society and culture.

For more information on the ACT position please contact Emilie Anthonis – EA@ACTE.BE

Commercial Television: central to the lives of Europe's citizens as the motor of media plurality & cultural diversity

- Our TV channels reach over 200 million European households in 28 EU member states and beyond
- Our online TV services are available in over 150 million European homes connected to the internet and are central to Europe's broadband story
- Our member companies deliver content to a range of devices and platforms in response to consumer demand, going from television to total vision

