



April 2018

Broadcasters' Regulation:

The negative market impact of the extension of the CoO principle in Article 2

- Introducing the CoO principle creates a default pan-European license and therefore weakens territorial exclusivity. This approach does not reflect the economic realities of European audiovisual content development, production, financing and distribution. **The European Parliament understood the immense risk of erosion of territorial exclusivity for the audiovisual sector in Europe and therefore proposed to limit the CoO principle – as an exception – to “news and current affairs” content.**
- Narrowing the scope of the CoO principle to “news and current affairs” helps to limit the erosion of territorial exclusivity. This approach recognises territoriality as the pillar of Europe’s cultural and creative content industries, whilst ensuring EU citizens continue to enjoy diverse, rich and affordable content through multiple distribution channels and at different price points.
- **However, broadening the scope of the CoO principle to television content that is “fully financed and controlled” by broadcasters will result in a harmful shift in the market place.** This shift will lead to the application of default contract provisions under which independent producers will no longer retain rights in the projects that they are involved in together with broadcasters.
- The concept of “fully financed and controlled” TV productions covers a large proportion of European television productions. **Subjecting such productions to default CoO licensing will put European independent producers and their creative partners such as authors, directors, and performers, at a disadvantage when negotiating with large, publicly-funded broadcasters.**
- Today, producers often finance the development of concepts, formats, or synopses for television content through a number of sources, including retention of certain rights when later working with broadcasters for the financing, production and distribution of the resulting content. Under the above-described market shift, where producers will no longer be in a position to negotiate the retention of rights as this would prevent the application of the CoO principle, they will be unable to recoup development costs. **Future project development will suffer, as will the entire value chain of creative and financial cooperation, to the detriment of employment, contribution to the economy, cultural diversity and choice of programmes for future audiences.**

- Being able to retain rights when working with broadcasters allows producers to build IP capital and catalogues of works in production companies. The inability to build such IP capital and rights catalogues deprives producers of the possibility to finance development costs for future projects and ensure the sustainability of their professional activities. **Producers will be reduced to working from one project to another, essentially becoming a “servicing entity” for public service broadcasters rather than actual partners in development, production and sometimes financing - the role which they play today.**
- **Applying the CoO principle to “fully financed and controlled” content will also exhaust the future value of the content outside the home market.** Independent distributors, who would previously have seen clear economic value in acquiring distribution rights for content for specific non-national markets, will immediately lose the incentive to do so under a country-of origin system where the very same content will have already been made available via an online ancillary cross-border service.
- Limiting the application of the CoO principle to ‘fully financed and controlled’ TV productions does not address the concerns related to the interaction of CoO with EU Treaty provisions on competition law and free movement of services. On the contrary, introducing the CoO principle will remove the copyright justification under competition law and Article 56 TFEU (free circulation of services).
- **The so-called contractual freedom to opt out of the default pan-European license set by the CoO principle is a theoretical option only. Independent producers do not have sufficient bargaining power to impose an opt-out faced with a public service broadcaster that wishes to apply the CoO principle.** The same goes for the theoretical possibility to negotiate a higher license fee as a result of the wider geographical scope of the rights involved. In any event, if the broadcaster has “retained all rights” (which they will, as explained above) the pan-European licence will be undisputable.
- Extending the definition of ancillary services, well beyond what is “ancillary” in terms of actual commercial value, to include services that are provided separately from a broadcast service, broadens the scope of application of the Commission's proposal considerably and further aggravates the adverse effects of the CoO principle on exclusive territorial licensing.
- Introducing CoO to radio online ancillary services will inevitably lead to forum shopping to the detriment of creators and right holders without delivering wider cross-border availability. Extending the European Parliament's position on CoO to radio programmes would be far less detrimental to music right holders.