

Source. The Association of Commercial Television in Europe represents the interests of leading commercial broadcasters in 37 European countries. The ACT member companies finance, produce, promote and distribute world class content and services on a range of platforms benefiting millions of Europeans.

Context. The Commission is currently reviewing the 1993 Satellite and Cable Directive¹ (“the Directive”) for potential application to online. This follows a public consultation² and a Copyright Communication³ (published 9/12/2015) considering legislative proposals for spring 2016 that include “*enhancing cross-border distribution of television and radio programmes online in the light of the results of the review of the Satellite and Cable Directive*”. ACT supports the Commission’s DSM objectives, but we do not believe that extending the principles of the Directive to the online environment would result in more cross-border availability of AV content. To the contrary, a revision may have negative consequences on European production, financing and distribution, in particular putting European broadcasters at a disadvantage and creating an imbalanced digital ecosystem.

ACT position. Our position can be summarised as follows:

Three key features of the Directive must be retained: (1) country of origin for satellite distribution; (2) contractual freedom; and, (3) the broadcaster's Article 10 exemption from the obligation to exercise its own or its acquired rights via collective management.

No real benefits from a potential extension of “Country of Origin”, but many draw-backs. Copyright law does not impede the provision of cross-border services. The necessary licenses are subject to straightforward commercial negotiations and are possible today. The problem lies in the lack of economically viable consumer demand. Commercial broadcasters use their contractual freedom to negotiate licenses that enable them to optimally meet consumer demand and re-invest in original content. In the current business environment these licenses are often national in nature.

At risk: Any attempt to undermine contractual freedom, as currently enshrined in recital 16 of the Directive, would jeopardise **consumer choice, innovative European online services, investment in European AV content and cultural diversity**. We are aware that a small number of stakeholders would like to see Recital 16 deleted, arguing that the **Country of Origin principle** applied to online should lead to *de facto* pan-European licenses. Similarly, ending all geo-blocking and enabling all service providers to reach out to consumers in 28 Member States would put an end to exclusive territorial rights and damage all future investment in European content. 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, films, 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;

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

² ACT replied to this consultation, the response can be found by clicking [here](#)

³ Communication COM(2015) 626 final of 9 December 2015 “Towards a modern, more European copyright framework”

- 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.

Exclusive territorial rights are key for commercial broadcasters as they **allow broadcasters to innovate and invest for the benefit of consumers**. Exclusive rights give broadcasters the confidence to invest in content production, curation, technology, customer service, marketing, etc. Undermining exclusivity creates significant uncertainty at every level of the value chain and limits the incentive to invest in these areas. Content could end up becoming commoditised and devalued, to the detriment of the consumer but also harming jobs across Europe. 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 consumers, the economy and cultural diversity.

No need to extend the “cable regime” of mandatory collective management. The Commission is also considering extending the mandatory collective management/cable regime of the Directive to the simultaneous unabridged retransmission of TV programmes on platforms other than cable (e.g. satellite, IPTV, internet). 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 2002 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 norms⁴.

The Broadcaster's Article 10 exemption from the obligation to exercise its own or its acquired rights via collective management is a key element. It is essential for the strategic development of the broadcasting/audiovisual industry that broadcasters retain control over the distribution of their programme services. Any move away from the Article 10 protection would have the effect of transforming broadcast content from a valuable commercial property into a commodity, which:

- undermines 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;
- disregards the high risk nature of broadcasters’ investment in audiovisual content; in a similar way to investment in the pharmaceutical sector, significant profits from relatively few hits are vital in order to pay for other investments that may be loss making.

Broadcasters invest almost half of their revenue back into original content and the Article 10 exemption is one of the prerequisites for this virtuous circle for consumers.

Alternative solutions to meet the Commission’s single market imperative while fostering investment in AV content. The **Portability Proposal** (subject to appropriate safeguards) can enable continued innovation and investment in the AV industry while providing consumer choice and meeting expectations in the digital age. ACT members are [supportive](#) of ensuring that EU subscribers can continue to access their online content service on a portable basis when temporarily present in another Member State.

The Commission should duly assess the other options identified in the Copyright Communication (page 6) that might foster more cross-border availability of AV content by leveraging its **‘Creative Europe’ programme**.

These solutions might create real consumer benefits without putting at risk a viable European AV industry.

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

⁴ Namely the WIPO Copyright Treaty (WCT), the WIPO Phonograms and Performances Treaty (WPPT) and the TRIPS agreement