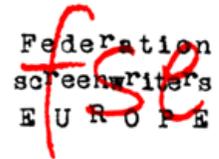


CoO - Impact on Creation, Production and Distribution of AV content in Europe
Reflections ahead of the next trilogy on April 17, 2018

April 12, 2018



Why is Europe's Audiovisual Sector opposing the CoO principle?

Introducing the CoO principle creates a default pan-European license and therefore weakens territorial exclusivity.

Territorial exclusivity is the foundation of the European film and television industry's financing and distribution model. This licensing practice generates the financing for most production, enables investors to recoup their contribution to development, production, marketing and distribution costs, and provides seed capital for future productions. Online rights in a film or television program cannot be severed from the other distribution rights and/or sold differently. Release online without territorial exclusivity undermines the value of distribution rights in other territories, thus cutting off an important financial contribution to production budgets. In addition, the overall cost of acquiring distribution rights for any one territory is often amortised across different distribution channels (cinema/physical carriers/online/television) - splitting the different distribution rights by applying different legal regimes to different types of rights will fundamentally unsettle both the financing and the distribution of audiovisual content.

The CoO approach therefore does not reflect the economic realities of European audiovisual content creation, financing, production and distribution. On the contrary, it threatens the virtuous circle of investment in culturally diverse creative content, highly skilled jobs and a wide choice of distribution channels in each Member State.

What is the problem with applying CoO to "fully financed", "fully controlled", or "commissioned" content?

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 limit the harmful erosion of territorial exclusivity. This approach recognises territoriality as the foundation of Europe's cultural and creative AV sector, whilst ensuring EU citizens continue to enjoy diverse and affordable audiovisual 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 as suggested by the Council General Approach will result in a harmful shift in the market place: public service broadcasters will seek to ensure content qualifies as "fully financed and controlled" by the use of default contract provisions under which independent producers will no longer retain rights in the projects they are involved in together with public service broadcasters.
- Moreover, the most recent attempts by the Council Presidency to propose an amendment of the scope of application of CoO to productions which are "**fully controlled**" by broadcasters **would actually broaden the scope of application of CoO** to a wider range of content and productions. This would further reinforce the stronger market position of public service broadcasters vis-à-vis independent producers.
- **The same concerns apply to attempts to mitigate the harmful impact of CoO by applying it to so-called 'commissioned' productions.** Very little television programming is developed and produced without commissioning of some kind. Moreover, co-productions and/ or commissioned

content often involve a 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. Whilst the production budget of a commissioned production may appear to be ‘fully’ financed by the broadcaster(s), there are many cases where the producer retains certain distribution rights, as the outcome of the negotiation with the commissioning broadcaster(s), including broadcast rights for territories outside the primary license. Underlying rights, such as format rights, are in most cases owned by the producer or a third party. Retained distribution rights are actively exploited by the production company or a designated international distributor. The activity generates additional revenue and ensures optimal distribution and exploitation of the content in other EU markets. In many cases, this exploitation makes up the margin for the producer. Applying CoO to such cases would expropriate these retained exclusive rights from producers, thereby undermining their capability to recoup their original pre-production investments in the creative development of commissioned productions. The ability to recoup these investments is pivotal in building the ability of the EU’s production SMEs to underwrite development activities on future projects, many of which may not be ultimately commissioned or “fully financed” by broadcasters and therefore require a higher financial risk-taking by the producer.

- We continue to have the **deepest concerns with regard to any definition of the ‘ancillary’ services to which CoO licensing will apply, which does not preserve a clear subordinate relationship to the broadcast** – the definition must not be expanded to cover services which are provided separate from the initial broadcast. 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.**

Subjecting “fully financed”, “fully controlled” or “commissioned” TV productions to default CoO licensing will put European independent producers and their creative partners such as authors, directors, and performers, at a distinct disadvantage when working with public service broadcasters for the development, production and financing of content. It will also negatively affect distributors and video publishers across Europe.

What is the expected market shift if the CoO principle is adopted? How are creators, producers, and distributors affected?

As mentioned above, producers often finance the development of concepts, formats, or synopses for television content through a number of sources, including retention of rights when working with public service broadcasters for the financing, production and distribution of the resulting content, irrespective of whether the project is initiated by the producer or commissioned by a public service broadcaster. With the application of the CoO principle, producers will no longer retain rights as this will prevent the application of the CoO principle as set out above. Producers will therefore be unable to recoup development costs and future project development will suffer, as will the entire value chain of creative and financial cooperation, to the detriment of innovation and creativity, cultural diversity, employment, financial contribution to the economy, and the choice of programs for future audiences. It is in the interest of all stakeholders and of European audiences to preserve vibrant national creative, production and distribution eco-systems delivering both national content and content which may travel in other Member States and beyond the European Union.

Being able to retain rights in the projects which they develop and produce allows producers to build IP capital and catalogues of works in their production companies. The inability to build such IP capital and rights catalogues will deprive producers of the possibility to finance development costs for future projects and ensure the long-term 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. Contrary to the objective of the Digital Single Market strategy to make EU businesses competitive at a global level, CoO licensing will deprive independent production companies of their very assets and independence. Rather than promote and preserve commercial freedom in the market place, subjecting “fully financed”, “fully controlled” or “commissioned” works to CoO licensing will have the opposite effect, resulting in reduced private sector creative and financial risk-taking and less entrepreneurship across the European audiovisual sector.

The impact on the appetite of public service broadcasters to invest in European co-productions will also be negative as broadcasters are likely to prioritize investments in content in respect of which CoO will apply.

What is the impact on distributors and video publishers?

Applying the CoO principle to “fully financed”, “fully controlled” or “commissioned” content will also exhaust the future value of such content outside the home market. Independent distributors and video publishers, who previously have seen clear economic value in acquiring distribution and publishing rights for content for specific non-national markets, will immediately lose the incentive to do so under the CoO principle where the very same content will already have been made available via an online ancillary cross-border service. Without non-national content in their portfolio, European distribution companies and video publishers will lose an important pillar of their business.

Can't producers just opt out of CoO – or at least get more money for the rights?

The so-called contractual freedom to opt out of the default pan-European license resulting from the CoO principle is a theoretical option only – as is the possibility to negotiate to retain rights and/or to secure that the producer’s financial investments in the project be taken into consideration in the financial arrangements as the public service broadcaster will seek to qualify a production as “fully financed”. Independent producers do not have sufficient bargaining power when they face a public service broadcaster seeking 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 public service broadcaster has “retained all rights” (which they will, as explained above), the pan-European licence will be undisputable.

Interaction with EU competition law and free circulation of services

Limiting the application of the CoO principle to “fully financed”, “fully controlled” or “commissioned” 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).

Signatories

ACT - Association of Commercial Television in Europe

ANICA - Italian Film and Audiovisual Industries Association

CEPI - European Coordination of Independent Producers

EUROCINEMA - Association de Producteurs de Cinéma et de Télévision

EUROPA DISTRIBUTION - European Network of Independent Film Distributors

EPC – European Producers Club

FEDICINE - Federación de Distribuidores Cinematográficos (Federation of Spanish Cinema Film Distributors)

FERA - Federation of European Film Directors

FIAD - International Federation of Film Distributors Associations

FIAPF - International Federation of Film Producers Associations

FSE - Federation of Screenwriters in Europe

IFTA - Independent Film & Television Alliance

IVF - International Video Federation - Publishers of Audiovisual Content on Digital Media and Online

MPA - Motion Picture Association

SPIO - Spitzenorganisation der Filmwirtschaft (Association of the German Film Industry)

UNIC - International Union of Cinemas

VOEP - Verband Österreichischer Privatsender

VPRT – Association of Commercial Broadcasters and Audiovisual Services