



**FIAPF Report on European Developments and  
Implications for Audiovisual Producers  
January – February 2019**

**EU Digital Single Market and Copyright Developments**

**Proposed Online Broadcasting Directive: Final Formal Adoption Imminent**

During the month of January 2019, the EU Member States and the European Parliament Legal Committee endorsed the political deal reached in the December 2018 trilogue on the Country-of-origin Directive (*see the FIAPF November-December 2018 Report*). After the ‘lawyer/linguist’ review, the formal adoption by the European Parliament is scheduled to be made on March 28<sup>th</sup>, 2019 and in April by the Council. The Directive will be then published in the EU Official Journal and enter into force 20 days thereafter. National transposition of the Directive shall take place within a 2-year implementation deadline. Nevertheless, note that Member States are often late in national transposition of EU Directives.

Following the final formal adoption of the Directive, FIAPF will provide an analysis of the legal instrument as well as guidelines for national implementation. As discussed at the FIAPF Working Group on EU Affairs in February, FIAPF will work closely with its European Members in the national implementation process to pursue the optimal implementation of the Directive, including preserving the narrowest possible application of the country-of-origin principle, etc.

Recall that the main provisions of the Directive are as follows:

- **Application of the country-of-origin principle:** The country of origin principle will apply to "news and current affairs" programmes and to broadcasters' "fully financed own" productions.
- **Narrow definition of ‘ancillary services’:** As regards the definition of ‘ancillary services’, the final agreed text helpfully excludes the Council’s proposed wording “whether bundled with or provided separately from a broadcast service”. Recital 8 also repeats that ancillary online services shall have a “clear and subordinate relationship with the broadcast”.
- **Retransmission and new article on direct injection:** The existing EU retransmission regime, including mandatory collective management, will be extended to cover retransmission over

an internet access service carried out in a ‘managed environment’. The term “managed environment” is defined as an environment where a retransmission operator provides a secure retransmission to authorised users.

The European institutions also agreed on language addressing the use of direct injection technologies in the context of retransmission.

- **Application and review clause:** In terms of implementation of the Directive at national level, the EU institutions have agreed on classic EU Directive language: “Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 2 years after the entry into force of this Directive.” There will thus not be a joint application date across the EU. It is therefore entirely possible that country-of-origin provisions will come into force at different speeds in different Member States. We advocated against such a situation by suggesting the adoption of a joint application date, but this recommendation was unfortunately not taken up by the EU institutions.

In addition, the Directive will provide for a traditional review clause rather than the biased review language proposed by the Commission which would already now establish a hook to extend the scope of the country-of-origin principle in the future. While the European Commission can always propose new legislation, including with digital single market and/or cross-border implications, the opposition from the European Parliament and the Council to the Commission’s proposal for a biased review clause constitutes an important political signal. The review to be undertaken by the Commission is foreseen 6 years after the entry into force of the Directive (20 days after publication in the Official Journal). For context, as mentioned above, the Member States have 2 years to implement the Directive into national law.

- **Preliminary assessment:** Our collective efforts over the past three years have thus resulted in a much narrowed-down scope of application of the country-of-origin principle – recall that the Commission’s initial proposal aimed to apply the country-of-origin principle/cross-border access to all content available on broadcasters’ ancillary online services, whether film or TV content. In the last phase of the legislative process we managed to reduce the application of the CoO principle from a default application to all TV programmes down to 'news & current affairs' and 'broadcasters’ fully financed own programmes'.

Recall that the Audiovisual Sector issued a Joint Statement to thank the European Parliament for its efforts and to discourage the Commission from pursuing future initiatives further eroding territorial exclusivity.

### **Territoriality: And the Quest Continues . . . Hugenholtz study for the European Parliament Culture Committee**

In a related development, a new study entitled [“Film Financing and the Digital Single Market: its Future, the Role of Territoriality and New Models of Financing”](#) was recently presented to the European Parliament CULT Committee. The study was commissioned back in October 2017 in the context of the discussions on the Country-of-Origin Directive (see above).

The study was authored by Prof. Bernt Hugenholtz and colleagues from the Institute for Information Law (IViR) at the University of Amsterdam. The new study is a further articulation

of ideas and concepts launched by Prof. Hugenholtz earlier on in the public debate on territorial exclusivity. The study bases its recommendations on the following findings:

- European films are considered less successful than US films in attracting large audiences. This is mostly due to language barriers, cultural differences and European films' dependency on direct and indirect public funding, argues the study;
- Drastic and sudden changes to territorial exclusivity will have significant effects on the European film industry in general and the practice of financing European films in particular; and
- The role territoriality plays in copyright is gradually being pushed back by EU law aimed at removing national barriers to the Single Market (cfr. The Portability Regulation, the Geo-blocking Regulation and the country-of-origin Directive).

The report recommends two different approaches for possible future action:

1. The European Commission could create specific competition rules regarding exclusive territorial grants of rights in the film and audiovisual industry, e.g. in the form of a Commission Block Exemption Regulation.
2. The market place could consider a change in licensing practices providing for exclusive grants of rights for distinct dubbed or subtitled language versions of a film or audiovisual programme as an alternative to territorial licensing. The possible ramifications for granting exclusivity based on widely-spoken languages such as English, Spanish, German, French or Italian are not considered by the study.

At the presentation at the European Parliament Culture Committee, Prof. Hugenholtz reportedly remarked that the growing importance of SVOD platforms in the market place and in the production/distribution value chain challenges traditional release patterns. He reportedly also noted that despite the disruptive developments, presales remain essential for film financing as regards the European films surveyed for the study, and that new financing models such as crowdfunding and product placement are of limited significance.

### **Proposed Directive on Copyright in the Digital Single Market: Final Formal Adoption Imminent**

During the months of January and February 2019 (and under considerable political pressure), the trilogue negotiations on the proposed Copyright Directive continued, resulting in political agreement on February 13. The political agreement was subsequently endorsed by the Member States in COREPER and by the European Parliament Legal Committee. The final adoption by the European Parliament was voted on March 27. The endorsement by the Council is now a formality. The proposed Directive has continued to meet opposition from various political groups in the European Parliament (for differing reasons), by the tech community and by groups advocating a free and unregulated Internet.

A successive stream of letters to EU decision-makers by FIAPF, local FIAPF European member associations and their member companies as well as the FIAPF's partners in the wider AV sector

have called for the utmost caution and further reflection with regard to the final text of the Directive, in particular around Art. 13 and its application to film and audiovisual works but also with regards to other elements of the Directive such as exceptions, out-of-commerce works and the provisions on relations with creative contributors. Copies of the many letters are available from FIAPF on request – attached you will find a sample from February 7, 2019 which sets out the AV Sector’s concerns with the overall balance of the Directive against the interests of the film and audiovisual production, distribution and publishing community.

### **EU enforcement developments**

#### **CJEU Reference: YouTube/Uploaded**

The European Court of Justice (CJEU) has been seized on the question of potential liability of online content sharing platforms for infringement of copyright content uploaded by their users ([YouTube/Uploaded joined Case C-682/18](#)). In this context, recall that the lack of CJEU jurisprudence in this field was part of the justification for the European Commission’s initial proposal on Art. 13 in the proposed Directive on Copyright in the Digital Single Market. The desirability of awaiting the CJEU’s ruling on this matter was the key argument in the film and audiovisual sector’s letter of January 15, 2019 to EU decision-makers, calling for a pause in negotiations on Art. 13. A copy is attached hereto for your interest.

#### **Italian Court Holds YouTube Liable for Copyright Infringement**

On 30 January 2019, the Court of Rome found Facebook liable for failing to remove copyright infringing and defamatory content uploaded by Facebook users.

The case evolved around Facebook users creating a Facebook group to insult a singer chosen to perform the opening song of an animation TV show, broadcasted by Italian RTI as the exclusive licensee. The Facebook group also linked to copyright infringing videos of the series uploaded on YouTube and contained pictures of the singer. RTI repeatedly sent takedown notices, and Facebook finally removed the relevant pages after 2 years.

Facebook argued that the linking to videos of the series uploaded on YouTube was not infringing. Based on earlier case law (e.g. [the CJEU in Stichting Brein](#)), the Court of Rome confirmed that linking on Facebook to copyright infringing YouTube videos constitutes a communication to a new public and thus constitutes an infringement absent authorization from relevant right holders.

Facebook also argued that it is a ‘passive’ hosting provider and therefore not liable for the copyright infringement. Referring to the [CJEU L’Oréal v. Ebay](#), the Court of Rome disagreed and held Facebook liable for damages as Facebook had actual knowledge of the infringement (via the notices sent by RTI), and knowingly failed to remove the infringing content for 2 years. The Court of Rome further noted that even a passive hosting provider who has actual knowledge is required to take prompt action: Facebook did not need to wait for a court order to remove the infringing content.

### **Other audiovisual related-developments**

## **EU Funding: next generation of the Creative Europe/MEDIA Sub-Programme (2021-2027)**

In the context of the ongoing decision-making process around the future budget and detailed provisions for the EU 2021-27 Creative Europe /MEDIA Sub-Programme, FIAPF and its partners across the film and audiovisual eco-system have been actively defending the interest of the film and audiovisual sector, in particular its production segment.

Beyond expressing support for the Creative Europe/MEDIA Programme, our collective advocacy efforts include support for the proposal for an general increase in the budget allocated to the Creative Europe Programme and a proportionate share of 58% earmarked for Creative Europe MEDIA as advocated by the European Parliament's Draft Report to reflect the sizeable investments made by the European audiovisual sector in the development, production, distribution, promotion and exhibition of films and other audiovisual productions, as well as the financial returns and reinvestment into the European economy resulting from the sector's success.

We have also taken the opportunity to stress the need to ensure that references to 'beneficiaries' of the future MEDIA Programme does not involve a risk that non-professional/UGC content may have eligible under the European funding schemes. FIAPF also promoted the notion that third countries should continue to be eligible as participating countries under the MEDIA Programme.

## **EU Eco-design Implementing Regulation**

Recall the European Commission's 2018 review of the implementing Regulation of Directive 2009/125/EC on Eco-design requirements for light sources and separate control gears (*see the FIAPF September-October 2018 Report*). The objective is to reduce energy consumption by spreading the use of LED lights. This has an impact on the use of professional lights in the creative content sectors, including live stage lights and lights used when shooting film and AV content.

Recall also that FIAPF and partners in Creativity Works! communicated the creative content sectors' concerns with a view to preserving the exemption for entertainment lighting.

The European Commission has now published the Implementing Regulation and Annex on Eco-design rules for lighting products, as adopted at the end of 2018. The new requirements will apply from 1 September 2021, with a review expected in 2023. The final text includes a large number of improvements advocated by the film/AV and live-performance sectors.

## **Other news**

### **European Audiovisual Observatory Report on European Cinema Attendance 2018**

The European Audiovisual Observatory has released its [first estimates for European cinema attendance in 2018](#). The Observatory estimates that total admissions in the European Union decreased by 3.0% to 955 million tickets sold. Continuing the trend of 2017, the modest decline in EU cinema attendance was primarily caused by a major drop in German admissions (-16.9 million,

-13.9%) as well as a comparatively poor year-on-year performance in France (-8.9 million, -4.3%) and Italy (-7.0 million, -7.0%), says the EAO. Out of the five major EU markets, only the United Kingdom registered an increase in cinema attendance of 3.7% to 177 million admissions. This is the highest admissions level in the UK since 1970. Admissions also grew to record levels in Poland (+3.1 million, +5.5%), Czech Republic (+1.1 million, +7.3%) and Romania (+0.6 million, +4.5%).

### **EAO Report on the Legal Framework for Co-Productions**

Recent European Audiovisual Observatory figures on European co-produced films suggest that these films travel better beyond their home markets than their purely national counterparts. In addition, the number of majority co-productions rose by 43% between 2007 and 2016. Overall, 20% of all EU films produced during this period were co-productions.

These trends are illustrated in a new [report](#) by the European Audiovisual Observatory on the legal framework for co-productions. The Report includes information on international support funds in and beyond Europe and international co-production treaties such as the Council of Europe's Convention on Cinematographic Co-production created in 1992 and revised in 2017 to include technological and economic developments in the film sector. The Report also quotes the Council of Europe's Eurimages, the EU's MEDIA sub-programme and the Nordisk film and TV Fond as major sources of funding for European co-productions. Beyond Europe, the Report touches on international co-production treaties such as the Ibero-American Co-production Agreement bringing together certain Latin American Countries and Spain, for example. The Report also provides detailed information on the various bilateral or multilateral co-production agreements, including important working parameters such as the minimal financial contribution of each producer, methods of sharing rights, revenues and prizes, and place of filming, pre-and post-production, for example with a checklist of elements to be included in co-production contracts.

### **EAO Report Mapping National Rules for the Promotion of European Works**

A new [report](#) by the European Audiovisual Observatory indicate that European films make up 27.5% of the European film market compared with 66.2% for US titles. European TV series episodes represent 19% of subscription VoD catalogues and 24% of titles available on transactional VoD.

The report was commissioned by the European Film Agency Directors (EFADs) and covers the 31 EFADs countries (EU-28 plus Iceland, Norway and Switzerland) with the aim of supporting Member States in the national implementation of the newly revised [Audiovisual Media Services Directive](#).