

**European Commission's Impact Assessment
On the proposed Regulation
on the Country of Origin for Online Transmissions**

**A Response by the Independent Film & Television Alliance®
[IFTA®]**

1. This document presents an analysis by the Independent Film & Television Alliance [IFTA]¹ of the Impact Assessment (IA)² document released by the European Commission on September 14, 2016 regarding the proposed Regulation on extending the Country of Origin principle to the online transmissions of some broadcast services [*COM(2016) 594 final*]. IFTA focuses its analysis on how the IA concludes that the Commission's 'preferred option' (option 2) is justified against the baseline option (status quo) and the nature of the evidence (or lack thereof) provided by the Commission to that effect.

2. IFTA is the global trade association of the independent film and television industry and the voice and advocate for the Independents worldwide. Our organization represents more than 125 members from 23 countries consisting of independent production and distribution companies, sales agents, television companies, and institutions engaged in production finance. IFTA Members rely heavily on Europe as a major marketplace to conduct business and roughly one-third of IFTA Member companies are established in European countries.³ In critiquing this segment of the IA, IFTA is able to call on a vast resource of detailed knowledge from its Member Companies regarding the current functioning of the EU marketplace for licensing broadcast and other rights to films and TV programmes.

3. The IA states, without offering corroborative evidence, that "*the definition of harmonised rules simplifying [...] the licensing of rights for online transmissions and retransmissions [...] would contribute to improving the functioning of the Digital Single Market, and in particular the distribution of and access to digital content.*"⁴ This assertion compounds together two separate concepts: that of "access" and that of "distribution". In reality, whilst the measure may technically facilitate cross-border access to content by no longer making certain online

¹ Transparency Register Identification Number: 359167112876-43

² SWD(2016) 301 final

³ A complete list of IFTA Member Companies is available online at <http://www.ifta-online.org/>

⁴ IA Part 2, page 12

broadcast services subject to geo-blocking, the measure, far from facilitating distribution, will severely hamper it.

4. “Distribution” implies an act of licensing in which a set of economic rights is signed over to a licensee in a given country against an agreed price. The EU boasts a dynamic sector of distribution companies that invest at significant risk in the purchase of such rights, inasmuch as they cannot predict in advance whether the local exploitation of the film or TV programme will cover the price paid for the license. High-risk in film and TV distribution is inherent in the nature of the end-product. Unlike many industrial commodities, a film or TV series is always, in some sense a prototype; as such, it requires a bespoke signalling investment and marketing strategy to attract audiences to it. The key incentive for the distributor to take such economic risk is the fact that it can then go on to exploit the rights on an exclusive basis for the territory of the license in a suite of uses including the film theatre, VoD platforms, pay-TV, free-to-air broadcasters, etc. The IA does not offer any analysis of the impact that the loss of exclusivity which would result from online broadcast services no longer being geo-blocked, would have on the ability of the distribution sector to afford this risk.

5. Additionally, the IA appears to be based on the unexamined premise that the proposed Regulation is justified because – although it “*would be a new situation for rights holders*” –it constitutes “*a targeted intervention limited to broadcasters’ ancillary online services and not affecting the contractual freedom of broadcasters and rights holders.*”⁵ This is a baffling assertion. It appears to ignore entirely a key dynamic of the audiovisual economy: the market for rights exploitation does not consist in a series of unrelated silos. On the contrary, any change in value in one segment of the economic value chain for audiovisual content will affect value and pricing in the rest of the chain. In this instance, the contemplated loss of territorial exclusivity on the online TV catch-up segment will negatively impact the value of the overall television license itself. In turn, a lower TV value will affect pricing in other segments such as theatrical, TVoD, SVoD or physical DVD. The IA does not substantiate its conclusion that the Regulation would be ‘targeted’ and provides no evidence that its effects would not impact other forms of exploitation of economic rights.

6. The IA also does not examine the potential impact of the Regulation on licensing values in Member States other than the one in which the first broadcaster to air a licensed programme/film is established. In this future scenario, the EU-wide availability of the licensed programme/film cross-border on the broadcaster’s online transmissions, would negatively affect the value of other broadcasters’ licenses in other Member States, owing to the lack of exclusivity. In this respect too, the IA’s assertion that the Regulation is ‘targeted’ is not based on an objective analysis of the marketplace.

7. The IA asserts, again without corroborative evidence, that the proposed regulatory measures “*are expected to benefit SMEs by reducing the administrative burden linked to the clearance of licensing rights*”⁶. This assertion is surprising. For at least those SMEs involved in the business of producing the films and pre-licensing or licensing said rights, our practitioners anticipate extensive

⁵ IA Executive Summary, page 3

⁶ IA Executive Summary, page 4

detrimental effects that may drive a proportion of them out of business altogether. Because the proposed extension of the Country of Origin principle to broadcasters' online services such as catch-up TV would compromise the ability to protect territorial exclusivities, licensing opportunities would shrink as distributors would have a disincentive to invest in locally releasing the licensed content. In turn, this would result in a decline in licensing revenue and the financing of new original content through the pre-licensing of rights to projects not yet produced or completed. The IA's assertion about the expected benefits is therefore baseless as far as the independent production and distribution sector is concerned.

8. The IA – as the Regulation itself – also appears to be predicated on the unexamined assertion that a) European broadcasters experience difficulties in the clearance of online rights, especially for cross-border use and b) that the alleged *“difficulties in acquiring online rights contribute to the limited availability of European audiovisual works in VoD platforms.”*⁷

9. The first assertion goes counter to the reality of the current actual practice of licensing the rights targeted by the proposed Regulation: for the majority of content commissioned by broadcasters, online broadcast rights are generally negotiated in a bundle with the original linear broadcast license. The IA contains no detailed evidence as to the ways in which - and the extent to which - this practice presents special difficulties and/or results in a surfeit of transaction costs. Nor is the Commission able to corroborate a related assertion that *“costs and the complexity of the task increase significantly if broadcasters want to make their online services available cross-border.”*⁸ In fact, the IA underlines that no such evidence was forthcoming from the parties allegedly affected: *“However, despite requests, neither the EBU, nor the Association of Commercial Television (ACT) provided data on cross-border transaction costs for clearing online rights, as compared to transaction costs in one jurisdiction.”*⁹ The Commission's conclusion on this matter, also contradicts its own gathered evidence, the 2014 CRA Study¹⁰ it commissioned and which concluded that the broadcasters' transaction costs concerned were small or negligible. The IA's conclusion regarding transaction costs is therefore tendentious.

10. The Commission supplies no evidence to support the second assertion. Indeed, the IA fails to demonstrate that the alleged barriers to acquiring online rights somehow limits the availability of European content on VoD platforms. In the main, online platforms acquire, market and curate content tailored to local consumer tastes and interests in the market where they are established. The IA makes no reference to this predominant model. Those platforms that offer their brands in several EU Members States also curate content on different online storefronts in each of the territories for which they have coverage, with different choices emphasised according to local cultural tastes and preferences. The notion that there is limited EU content on those platforms is a sweeping generalisation that appears to ignore the significant variations that exist. For instance, some platforms (e.g., those under the Eurovod umbrella) cater

⁷ IA Executive Summary page 1

⁸ IA, page 20, footnote 70

⁹ IA, page 20

¹⁰ *Economic Analysis of the Territoriality of the Making Available Right in the EU*, Charles Rivers Associates, March 2014, page 96

principally to demand for European content, whilst others may emphasize international content from outside Europe and/or local content. Overall, the contemporary European consumer has never enjoyed as wide an array of online video choices of content as he/she does today.

11. Although it refers to a 2011 study and a 2015 survey by Eurobarometer the IA quotes these sources so selectively as to make it seem as if there is a critical mass of consumer demand for accessing audiovisual content cross-border. The conclusion is highly debatable, once all relevant data are taken into account. In point of fact, the most recent of the two sources (2015 survey) has 94% of respondents reporting they had no difficulty finding the content they searched for online and 95% saying they had not attempted to look for online content cross-border. Additionally, the survey shows only 5% of respondents even attempted to access content cross-border through the Internet. The evidence for a quantum of demand that may justify resorting to option 2 is not in any way conclusive and cannot serve as a credible basis to justify this unwelcomed intervention in the licensing marketplace.

Conclusions

- ✓ The evidence provided in the IA as justification for the proposed Regulation on extending the Country of Origin principle to the online transmissions of some broadcast services is incomplete, tendentious and non-conclusive;
- ✓ Not only is there no evidence to suggest broadcasters' transaction costs are prohibitive – whether for local or cross-border clearances - but there is in fact pre-existing evidence to the contrary from a study commissioned by the EC (2014 CRA Study);
- ✓ The IA's assertion that the proposed Regulation would “contribute to improving the functioning of the Digital Single Market” ignores a swath of evidence supplied by the EU audiovisual industry as well as independent studies on the topic. This existing evidence demonstrates the opposite: that by compromising the ability of the industry to license territorially, the effect on the Europe would in fact be severely detrimental as the loss of exclusivity would damage our sector's capacity to finance new original content and distribute it across the EU – the EU consumer would experience a loss of choice as supply would concentrate in a smaller number of market operators with the massive infrastructure necessary to provide content effectively to consumers on a pan-European basis.
- ✓ The available evidence (e.g., Eurobarometer data) suggests demand for cross-border access to audiovisual content from other Member States is a low priority for the majority of EU consumers. The IA concludes otherwise, despite this conclusion contradicting existing data;
- ✓ The IA does not provide supportive evidence to justify a Regulation whose chief purpose appears to be to reduce the licensing transaction costs of Europe's broadcasting organisations for a form of cross-border licensing that fails to match actual consumer demand. Europe's free-to-air broadcasters are well-financed, large-scale organisations with extensive

management systems that process large volumes of transactions. For the Commission to seek to lower their costs to the detriment of the sustainability of an already precarious independent production sector, is disproportionate.

End. IFTA/29/11/16

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**Annex – List of studies on the territoriality of Audiovisual rights in the EU –
evidence provided to the EU Commission 2012-2016**

1. [The impact of cross-border access to audiovisual content on EU consumers](#)
Oxera and O&O, May 2016
2. [Economic analysis of the territoriality of the making available right in the EU](#)
Charles Rivers Associates, March 2014
3. [A study on the potential impact of the Digital Single Market on the sports
audiovisual ecosystem in Europe](#)
Sports Right Owners Organisation (SROC), June 2016
4. [Study on territoriality and its impact on the financing of audiovisual works](#)
European Audiovisual Observatory, IRIS Plus, September 2015
5. [Case studies on the financing and distribution of recent European films &
television series](#)
IVF/FIAPF/IFTA/MPA, July 2015
6. [Study on the making available right and its relationship with the reproduction
right in cross-border digital transmissions](#)
De Wolf & Partners, December 2014
7. [Study on the application of Directive 2001/29/EC on copyright and related
rights in the information society \(The InfoSoc Directive\)](#)
De Wolf & Partners, December 2013
8. [Key Findings of the European Commission's Eurobarometer 2015 on Cross-
border Access to Online Content](#)
Creativity Works!, December 2015
9. [Why territories matter. Vertical restraints and portability in AudioVisual
Media Services](#)
Olivier Bomsel & Camille Rosay, October 2013
10. [The value of territorial licensing to the EU](#)
Enders Analysis, October 2013
11. [The economic potential of cross-border pay-to-view and listen audiovisual
media services](#)
PLUM study, March 2012
12. [Multi-territory licensing of audiovisual works in the European Union](#)