

Audiovisual Coalition submission to the Public Consultation on the European Commission's Preliminary Report on the E-Commerce Sector Inquiry

18 November 2016



The undersigned organisations, comprising trade associations, professional bodies and trade unions representing film makers, authors, technical crews, producers, publishers, exhibitors, distributors and commercial broadcasters (the "**AV Coalition**"), appreciate the opportunity to respond to the European Commission's Public Consultation on its Preliminary Report on the E-Commerce Sector Inquiry which was published on 15 September 2016 (the "**Preliminary Report**"). The AV Coalition acts on behalf of individuals and entities from across the entire value chain involved in developing, creating, producing, financing, marketing and distributing films and television content in Europe. It is highly representative of a sector of vital importance to economic growth and job creation as well as a crucial contributor to cultural diversity in the EU¹.

¹ [EY study Creating Growth - Measuring Cultural and Creative Markets in the EU](#), December 2014, and [EU Intellectual property rights intensive industries and economic performance in the European Union, Industry-Level Analysis Report, October 2016 Second edition](#), European Observatory on Infringements of Intellectual Property Rights.

The AV Coalition would like to share some general observations in light of the main findings of the Preliminary Report. Our focus is on the findings related to "E-Commerce in Digital Content":

- > While the focus of the Preliminary Report is necessarily on licensing practices, it repeatedly understates or misinterprets the role that copyright and commercial freedom play in enabling the creation, financing, production and distribution of film and television content in the film and television sector. Indeed, with respect to financing, the Preliminary Report mentions the low response from right holders and DCPs, which *"makes it difficult, if not impossible to identify a prevalent trend"*. Then, in footnote n. 349, the Preliminary Report states that *"Little substantive evidence was provided on the importance of pre-sale arrangements to fund new products by respondents, in relation to the products included in the sector inquiry"*.
- > Against that background, we recall that most films and television content in Europe are most commonly partially financed through territorial co-production and/or pre-sales agreements with a wide diversity of future local distribution partners either through output deals or single title agreements. The overall cost of acquiring distribution rights for any one territory is amortised across different distribution channels (cinema/physical carriers/online/various forms of television). In many instances, the distribution rights for individual territories are acquired by single entities which amortize the investment across the various distribution channels. Thus, it is important to preserve the possibility to agree territorial exclusivity in the same manner for the different distribution channels – different approaches to different distribution forms and/or rights would have a negative effect on the value of the rights and future recoupment opportunities. In addition, the fundamental costs of developing, producing, marketing and distributing films and television content are very high and development, production and distribution are risky investment propositions². As noted by the European Commission, *"The average production budget varies considerably from Member State to Member State. In the UK it stands at EUR 10.9 million, in Germany and France around EUR 5 million and in Sweden EUR 2.6 million"*³. In 2014, 222 films started principal photography in the UK, with a total UK spend of £1,471 million⁴. This sets the film and television sectors apart from other content sectors. In sharp contrast with the footnote mentioned below, an unprecedented number of studies (please see a full list below) has confirmed that licensing on a territory-by-territory exclusive basis is essential to raising those massive upfront investments indispensable for the financing for films and audio-visual productions.
- > Moreover, the Preliminary Report frequently refers to "contractual restrictions" as if they were distinct from exclusive rights protected by EU and national constitutions' copyright

² See the examples of the four film case studies from Licenses for Europe – their budgets range from EUR 6M to EUR 18M - <https://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/Audiovisual-FIAPF-IVF-IFTA-film-industry.ppt>.

³ European Commission's Communication European film in the digital era Bridging cultural diversity and competitiveness - [COM/2014/0272 final](COM/2014/0272%20final)

⁴ Latest stats (Feb 2015) from the British Film Institute covering, film, TV and animation - <http://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/film-high-end-television-animation-programmes-and-video-games-production-in-the-uk-2014-2015-02-03.pdf>.

law and the Charter of Fundamental Rights of the EU (Article 17(2)). In fact, these so-called “restrictions” are part and parcel of the implementation of the rights granted pursuant to contractual agreements between DCPs and right holders for the online distribution of films and television content. As a general matter, they are entirely consistent with the legitimate exercise of exclusive rights which are protected by not only EU law but also international treaties to which the EU and its Member States are party. It is crucial that the Commission understands and recognises the link between the copyright system and the industry's exclusive licensing practices, including the ability to raise production financing and to pursue the optimal distribution of the resulting films and television works across Europe. It is precisely the perceived/estimated value of the territorially exclusive rights in the various works which serves as the currency for producers when financing films and television works – and which enables future distributors of the same works to amortize their investments in creating a market for the said works in the various distribution channels adapted to each specific territory for cultural/linguistic specificities, social climate, tastes and cultural ‘zeitgeist’. Thus, reduced or limited exclusivity does not just affect future revenues as alluded to in the Preliminary Report but impacts the very conditions for creating, producing, marketing and distributing films and television content in the first place. An abolition or erosion of the exclusive licensing system would result in less market appetite for financing, marketing and distributing films and TV content, leaving consumers with impoverished content offer, lacking cultural diversity.

- The audiovisual ecosystem in Europe is highly interdependent in terms of cooperation on raising financing and pursuing the optional marketing and distribution in each territory – creating an audience for films and TV content beyond their immediate home markets. The sector shares many of the significant creative and financial risks associated with financing, marketing and distributing films and television content in Europe. The sector depends on strong copyright protection and on the ability to finance, market and distribute films and television content based on contractual freedom and exclusivity.

In conclusion, we strongly encourage the European Commission:

- i) to acknowledge the role of copyright as a fundamental right, and
- ii) to take account of the evidence provided by the studies that have demonstrated that the commercial freedom to organize the financing and future distribution of each film and TV programme on a territorial basis, including on an exclusive basis, is indispensable in order to maintain the industry's ability to finance film and television content in Europe.

Annex: List of studies (page 5)

Signatories

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UNIC - International Federation of Cinemas, *Jan Runge, CEO* - jrunge@unic-cinemas.org

[Annex: list of studies](#)

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](#)
KEA study, October 2010