

22nd September 2017

Dr. Ros Lynch
Director
Director of Copyright and IP Enforcement Directorate
IPO
4 Abbey Orchard Street
London SW1P 4HT

By e-mail to: ros.lynych@ipo.gov.uk

Dear Ros,

Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes (*Brussels 14.9.2016 COM(2016) 594 final 2016/0284 (COD)*)

The British Copyright Council is aware that its music industry members have already made representations to IPO on the European Commission's proposal for a Regulation on online broadcasting transmissions and retransmissions. The BCC supports the position put forward by the music industry. The BCC has also seen the Audiovisual Sector Coalition letter to the Estonian Presidency of the European Union and to members of the European Council's Working Group.

As well as right holders across the music industry, the BCC also represents a wide range of other right holder contributors to audiovisual works. Many of these right holders operate as individuals or through SMEs. The impact of this proposed Regulation will be detrimental to their rights and interests and it is on behalf of these members that we now write.

The BCC understands that the proposal for a Regulation will be discussed at the next European Council Working Group at its meeting in October 2017. This meeting provides UK Government with a welcome opportunity to oppose the introduction of the Regulation, on the basis that it is not justified and is superfluous and to reject it in its entirety.

If rejection of the proposal is politically unachievable, the BCC suggests support for those European Union Member States rejecting Article 2, which contains the most difficult part of the proposed Regulation i.e. the Country of Origin approach. Any extension of the scope originally proposed by the Commission as suggested by individual MEPs at the recent JURI meeting should be rejected unconditionally.

A. The BCC opposes extension of the Country of Origin principle to the licensing of copyright

Applying the Country of Origin principle distorts the market and ignores the simple principle that services are consumed in the country of destination whatever the country of origin. This irrational approach artificially separates the origin of a broadcasting service and the reception. The BCC is concerned that by allowing such artificial separation the Regulation will lead to establishment shopping by broadcasters resulting in a race to the bottom for the prices paid for creativity.

We expect that bigger companies will be able to adjust their business models as well as their enforcement activities in various countries to prevent establishment shopping. It will be smaller companies and individual traders (i.e. mostly those creators and performers represented by the BCC) who will suffer from the negative impact of the regulation.

We are concerned that the Impact Assessment does not consider the detailed concerns put forward by the music industry in the lead up to the publication of the proposed Regulation in September 2016. In particular we stress that the market, based on licensing by right holders, already works.

B. Red lines for BCC Members should the European Council not reject the Regulation in its entirety

As stated in the opening section of this letter, the BCC is firmly opposed to the introduction of a country of origin principle. However the BCC is also conscious of political realities and, if the prevailing view of the European Council is not to reject the Regulation in its entirety, this Regulation is likely to be introduced in some form. For this reason, we have set out our thinking on the detail of its introduction for IPO to consider.

Any introduction of the country of origin principle must be carefully circumscribed. In particular, Article 2 should:

- i. not be extended beyond the scope of the Commission's proposal. If it is not firmly restricted to ancillary services that are tied to the broadcasters' main transmissions, all the risks are exacerbated.
- ii. be limited to news and current affairs broadcasts, which appear to be the practical concern raised by those broadcasters who have pressed for this provision.
- iii. exclude services that are targeted mainly at another Member State, which would help reduce the risk of services 'establishment shopping' for the country with the lowest rates.

C. Direct injection

The BCC notes the amendments that have been proposed in the Parliament in relation to 'direct injection' transmissions and would welcome a legislative response to this issue.

As IPO will be aware, the TV broadcast market involves two distinct types of economic operator: broadcasters and pay-TV package providers (i.e. Sky, BT, TalkTalk, Virgin). They have different business models: broadcasters' income is principally revenue from advertisers (£4.1bn in the UK in 2016). Package providers' income is the subscription fees from their subscribers (£6.4bn). Both business models rely, in different ways, on the creative content that attracts viewers.

As the BCC said in its 2016 response to IPO's Call for Views on DSMS, this proposal for a regulation does not adequately address the distribution of broadcasts via "Direct injection".¹

"Direct injection" transmissions (where broadcasters send closed transmissions to TV package providers) are a routine method of delivering broadcasts. In *SBS Belgium* the CJEU ruled that direct injection transmissions do not qualify as a communication to the public. The consequence of application of the judgment is that whereas broadcasters attract their advertising revenues on the basis of the creative content that they broadcast, they are under no obligation to pay right holders. This is manifestly unfair and economically unsustainable. It is critical therefore that the law makes it clear that both broadcasters and TV package providers engage in distinct copyright-restricted acts when they make their transmissions.

¹ http://www.britishcopyright.org/files/5714/8111/6697/BCC_response_to_IPO_Call_for_views_061212.pdf

Clarification that direct injection constitutes communication to the public, as has been suggest in the European Parliament, is welcome.

The BCC would welcome the support of IPO in this matter and looks forward to hearing back from IPO after the meeting of the European Council Working Group. In the meantime, if you or your colleagues have any questions or wish to discuss the matter further, please do not hesitate to contact me either on the number above or on 07788413807.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Janet Ibbotson', written over a light grey rectangular background.

Janet Ibbotson
Chief Executive Officer