

**EFADs COMMENTS ON THE EUROPEAN COMMISSION CONSULTATION  
ON THE REVIEW OF THE EU SATELLITE AND CABLE DIRECTIVE 93/83/EEC**

**16<sup>th</sup> November 2015**

Having examined the questionnaire on the effect of the current provisions in the Satellite and Cable Directive 93/83/EEC and which contains also questions aimed at exploring extending the scope, the EFADs would like to share the following considerations/comments:

1. It is broadly recognized that the Directive 93/83/EEC has been a useful legal instrument to facilitate the clearance of copyright and related rights and ensure the protection of authors in the EU while reflecting the diversity of legal systems.  
As for other legislations, any future revision of the text should be based on:
  - Thorough evidence-based evaluation;
  - Respect of subsidiarity, opportunity and proportionality
2. If deemed necessary, the revision of the text should be carried out with the commitments to preserve 3 core guiding principles, which lie at the heart of the audiovisual ecosystem:
  - territorial licensing and exclusivity;
  - respect for contractual freedom;
  - remuneration of right holders.

As stated in its *Resolution on potential reforms to European Union Copyright rules: initial view* (March 2015), the EFADs consider that territorial exploitation and exclusive rights are an economic mechanism to bring together right holders and investors and thereby optimise the financing and distribution of works. They serve as fundamental keys for fair and reasonable agreements between right holders and distributors fostering a healthy environment for free trade.

Territorial licensing is indeed key to:

- The financing of audiovisual works. Film and television producers depend on selling distribution rights to national distributors before filming starts as a means of financing. This practice, known as pre-sales, represents a very significant part of the financing plan of a film – sometimes the majority of financing is generated in this way. It is based on exclusive rights to exploit the piece of work in a specific territory. Sometimes the rights are not sold in advance but a third-party makes financing available against the value of selling the territory once the film is made – this is called gap financing and relies on the same principle of territorial exclusivity. Removing territoriality would lead to less engagement of private investors in pre-sales, dramatically reducing the number of works created.

- Optimal return on investments through multitude of exploitations that are a more efficient way to exploit and maximise the economical potential of audiovisual works. This enables the creation of more value and the capacity to reinvest in new creations, especially because in several countries some or all of the platforms in the chain of exploitation – for example pay-TV services - actively contribute to the creation of audiovisual works.
  - Efficient and targeted distribution strategies, adapted to the various local audiences and local market situation. Being able to access a piece of work on an online platform does not guarantee attracting an audience nor ensure commercial performance. Success depends mainly on the promotion, communication and marketing activities adapted to the local audience. Territorial licensing is crucial to ensure cultural diversity. Removing it would imply a dangerous standardization of creation because only the biggest and strongest audiovisual actors would survive.
3. The EFADs therefore do not support the introduction of the country of origin principle in the online retransmission environment, in particular as far as cinema and audiovisual works are concerned. It will result in de facto pan-European licenses and the implementation of cross border access to TV programmes whose detrimental effects can be summarized as follows:
- Less demanding countries in terms of copyright will become attractive “countries of origin”<sup>1</sup>.
  - A drop in broadcasters and distributors investments. It is unlikely that channels and distributors will invest in the production and distribution of audiovisual works if these works can be easily found online in another country. This will result in less financing capacity for the production as well as for local distribution, leading to a smaller audience.
  - Less cultural diversity and consumer choice: homogenization of the offer in terms of languages and content. Only a few platforms will indeed be able to afford the acquisition and market costs of such pan-European licenses. This will favor large European-wide players to the detriment of local broadcasters.
  - Legal and practical difficulties to implement and make it more difficult to fight online infringements.<sup>2</sup>

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<sup>1</sup> As stated in the De Wolf Study (Jean-Paul Triaille, Séverine Dusollier et al. 2013. “Study on the application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (The InfoSoc Directive). De Wolf & Partners, European Commission): “A “country of origin” approach would « create new bottlenecks. Firstly, the localization (and therefore the entitlement of the different right holders) depends on the acts of the uploader, who may choose a location in her own favor (generally with a lower overall copyright protection) or by criteria that are not relevant from a copyright perspective (e.g. an establishment for fiscal reasons). Secondly, licenses granted by the person who owns rights in one Member State may affect, even undermine the rights of persons in other Member States (in case of territorial fragmentation).”

<sup>2</sup> See De Wolf Study (Sari Depreeuw and Jean-Benoit Hubin. 2014. “Study on the making available right and its relationship with the reproduction right in cross-border digital transmissions.” De Wolf & Partners, European Commission): “existence of reproductions and their relation to the making available right entail complications in terms of licensing and infringements of rights.”

## **Annexe I**

### About the EFADs

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Transparency Register's Number: 430805515370-85.

Existing since 2001 as a network, the EFADs - European Film Agency Directors become in December 2014 an Association (aisbl), based in Brussels under Belgian law. The EFADs Association brings together the Directors of the European Film Agencies from 31 countries in Europe (EU, Iceland, Norway and Switzerland). The President of the EFADs is Peter Dinges, CEO of the German Federal Film Board (FFA) and the Vice-President is Guy Daleiden, Director of the Film Fund Luxembourg. Its General Secretary is Iveta Dimova.

We represent government, or government associated bodies, in charge of national funding for the audiovisual sector and with the responsibility to advise on all aspects of national and European audiovisual policies. Our aim is to help nurture the creation of high quality works to the benefit of European and global audiences reflecting the diversity of European heritage, cultural identities and artistic outlook within the audiovisual field in line with the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

In total, the EFADs members and their Governments distribute an estimated 3 billion euros every year<sup>3</sup> with a view to fostering the creation, production, promotion, distribution and exhibition of European audio-visual and cinematographic works.

The EFADs have already expressed views in relation with the DSM, namely in Position papers, respectively on: the potential reform of copyright (March 2015): <http://www.efads.eu/pdf/EFADs-resolution-copyright-032015.pdf> and on the creation of a Digital Single Market for the audiovisual industry in Europe (May 2015): <http://www.efads.eu/pdf/efads-pp-dsm-may2015.pdf>, as well as on the consultation on the AVMSD: <http://www.efads.eu/pdf/EFADs-30092015.pdf>, all consultable at: [www.efads.eu](http://www.efads.eu)

More information about the EFADs at: [www.efads.eu](http://www.efads.eu)

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<sup>3</sup> See footnote 1 of the Cinema Communication: «EUR 2,1 billion of support is provided annually by European film funds (<http://www.obs.coe.int/about/oea/pr/fundingreport2011.html>). According to the study into the economic and cultural impact of territorial conditions in film support schemes, a further, estimated EUR 1 billion is provided annually by Member States through film tax incentives ([http://ec.europa.eu/avpolicy/info\\_centre/library/studies/index\\_en.htm#territorialisation](http://ec.europa.eu/avpolicy/info_centre/library/studies/index_en.htm#territorialisation)).»