

Digital Single Market Working Group submission: Intellectual Property Office consultation on cross-border portability of online content services

The Digital Single Market (DSM) Working Group welcomes the opportunity to respond to the Intellectual Property Office consultation on the cross-border portability of online content services.

This submission has been prepared on behalf of a group of companies and trade associations from the UK audio-visual sector. As a result, it is a high level response.

Members of this group may make individual submissions and will determine their commercial responses to the Portability Regulation and related developments individually. Our purpose here is to respond to certain legislative policy questions in the consultation that cut across the sector.

The IPO will recall that the DSM Working Group has come together to enable the industry to raise our deep concerns about proposed legislative reform pertaining to copyright in the context of the European Commission's Digital Single Market agenda. The group is chaired by John McVay, Chief Executive of Pact, and has representation from across the film and television industries, including: public and other broadcasters; major companies and organisations that invest in, produce, and market film, video and TV content in the UK; independent film makers; and film, video and television distributors.

As an industry we are supportive of balanced measures to provide consumers with access to legally subscribed film and TV services, both online and via other more traditional broadcast mechanisms, while consumers are temporarily present in a Member State other than their country of residence. To this end, individual members of this Working Group are preparing to comply with this Portability Regulation from 1 April 2018.

The Portability Regulation provides benefits not only for UK consumers travelling to or within the European Union, but also for consumers from other EU Member States travelling to the UK.

Industry would be supportive of the Regulation continuing to function after Brexit for the benefit of all consumers and stakeholders, provided that the appropriate legal framework and safeguards can be established and enforced.

Such a legal framework has to work both from a copyright perspective and also with respect to other areas of regulation, including in particular with regard to the provision of audio-visual media services.

Future relationship with the European Union

The essential part of the Portability Regulation is the so-called "legal fiction" in Article 4. This deems the provision of an online content service under this Regulation to a subscriber who is temporarily away from their Member State of residence and is now present in another EU Member State, as well as the access to and, the use of, that service by the subscriber or authorised user to be occurring solely in the subscriber's Member State of residence.

The functioning of this legal fiction and the regulation is based on the Country of Origin principle in a directly applicable legal instrument. After Brexit, it cannot be applied to "localise" activities pertaining to cross-border portability of services for UK subscribers in the EU, and for EU subscribers

in the UK respectively, in the absence of a specific arrangement between the UK and the EU that enables the continued application of the legal fiction. That agreement will have to recognise that the provision of cross-border portability services implicates not only copyright law, but also a range of other areas including the regulation of audiovisual media services.

If no such agreement is reached, it would be inappropriate for UK law to continue to apply the obligations in the current Regulation unilaterally to service providers in the UK as they will simply not be in a position to rely on the legal fiction to deliver what is required. In short, UK service providers who continue to provide portability after Brexit – in the absence of a reciprocal agreement between the UK and EU/EEA – would be at severe risk of breaching the rights of third party right holders in the EU¹.

Without an agreement addressing these issues between the UK and the European Union, the Portability Regulation will no longer be able to function as a part of the law in force in the UK. There has to be a universal recognition of the legal fiction, if it is to remain workable. It is simply not within the sole gift of the UK legislature (nor for that matter industry on its own). There would be significant copyright and other legal implications for both UK and EU businesses and consumers if the obligations contained within the Regulation are continued after the UK has left the European Union.

From a consumer perspective, it would obviously be highly unsatisfactory that a service they currently subscribe should become portable in April 2018, only to cease being portable in April 2019 (or at the point at which any transitional period ends). This consumer detriment is just one reason for urgent Government attention on this matter.

The Government therefore needs to make clear its intentions. We note that the Government intends to publish further guidance on the Portability Regulation in the coming months. This guidance should be accompanied by a clear statement of the concrete steps the Government intends to take to secure an agreement which enables the Portability Regulation to continue to function legally after Brexit.

Throughout the process of negotiation of the future relationship between the UK and the EU, we would be happy to make experts from members of the Working Group available to you to help develop a solution to the problem identified.

Enforcement

Given the uncertainties over the Brexit negotiations, the consultation sensibly identifies a number of existing legal mechanisms to enable enforcement of provisions in the Regulation. We also accept that it is reasonable to review whether the proposed enforcement regime has achieved its objectives. Decisions on enforcement should however be guided by the principle of the minimum required for compliance with the Regulation, so as to not give a misleading impression to stakeholders in the value chain, particularly consumers.

¹ In addition, there is the chance that other factors would apply – for example that the content accessed by a UK-resident traveler who is temporarily on holiday in another country is not legal to be viewed in that country for reasons other than copyright.