

29 January 2018

Response to Intellectual Property Office's consultation on cross-border portability of online content services by TVPlayer

1. TVPlayer is an innovative online content service provider operating in the United Kingdom (including the Channel Islands). Through a series of licence agreements with content providers, including the BBC, ITV Channel 4, Five, UKTV, Discovery, A+E Networks, Viacom, Sony, Turner, FOX and NBC amongst others, TVPlayer offers subscribers legal access to live television channel streams and on-demand content using either a web-browser or application software (the **TVP Service**). Our subscribers can access the TVP Service via big screen and small screen devices, on both a free and paid-for basis. More information on the TVP Service and the content providers with whom TVPlayer has agreements can be found [here](#).
2. As the TVP Service will be directly affected by the EU Regulation on Ensuring Cross-Border Portability of Online Content Services (the **Regulation**), TVPlayer is preparing for entry into force of the Regulation on 1 April 2018. TVPlayer therefore welcomes the opportunity provided by the IPO to respond to its consultation on the impact and enforcement of this new EU-wide portability regime.

Leaving the European Union

3. At present, TVPlayer only provides access to the TVP Service to consumers in the United Kingdom in compliance with the terms of licence agreements and applicable laws. The Regulation therefore provides the opportunity for TVPlayer to offer its subscribers an important new functionality that will enable them to maintain access to the TVP Service whilst travelling within the EU. TVPlayer's view is that this is very much in the interest of consumers and we would be supportive of the Regulation continuing to function post-Brexit. However, we are concerned about the potential disadvantage that would accrue to UK consumers should that not be possible. TVPlayer therefore urges Government to consider and consult on concrete steps that can be taken to avoid depriving UK consumers so soon after they have begun to enjoy the fruits of the Regulation.
4. The Regulation facilitates portability without consequently placing online content service providers in breach of copyright (or other related rights) or other laws when they provide their subscribers with access to their services across the EU by applying the so-called "legal fiction" described in Article 4. This legal mechanism deems both the provision by the online content service provider, and the receipt by the subscriber, of the service, to take place in the subscriber's Member State of residence.
5. However, post-Brexit, absent a specific arrangement between the UK and EU, it is not clear whether this legal fiction can be applied to "localise" activities relating to cross-border portability of services for UK subscribers in the EU and for EU subscribers in the UK, respectively. Given the fact that the fiction is reliant on a form of reciprocity between Member States of the European

Economic Area (EEA) and that the United Kingdom would no longer be a member of the EEA (as we understand the Government's current intentions), TVPlayer expects that many stakeholders in the audiovisual sectors, would oppose unilateral steps to maintain its application to the UK consumers. Although the audiovisual sector is supportive of EU portability, that support is conditioned on fully functional fiction that "protects" not only platforms but also broadcasters and other rightsholders. TVPlayer welcomes any guidance from the IPO on the appropriate legal framework the Government intends to secure to deal with this matter.

6. Although the Regulation obliges TVPlayer to offer portability on its paid-for service "typlayer Plus", we retain the option of determining whether or not to offer portability on our free service "tvplayer free". Obtaining clarity on how portability will apply post-Brexit, before 1 April 2018, is therefore particularly important for TVPlayer, given that the framework for the application of the legal fiction post-Brexit may significantly impact our decision to offer portability to subscribers who receive the free TVP Service. Aside from TVPlayer's consideration of whether or not to avail itself of the Regulation in respect of our free TVP Service, a significant amount of time and money will be expended getting the paid-for TVP Service ready to comply with the Regulation. To do so, only to have to reverse these procedures and processes 12 months later, would not only mean that TVPlayer incurs significant costs, but the experience for the UK consumer will be particularly detrimental, with subscribers already enjoying the benefits of the Regulation by this time. If we are to take the additional steps to enable this functionality for subscribers to our free TVP Service as well, we need legal certainty that we will not have to pull the rug out from under their feet soon thereafter.

Guidance

7. Aside from TVPlayer's desire to obtain clarity from Government as to whether portability will continue to have effect post-Brexit and the concrete steps the Government will take to ensure this important functionality for UK subscribers, we would also appreciate consideration of and guidance on the application of Article 7(1) of the Regulation. We appreciate that Government is not in a position to provide a definitive legal view as to where the line is likely to be drawn as this will ultimately be a matter for the European Court of Justice. However, as the UK Government participated in the EU legislative process, TVPlayer and likely others in the audiovisual sector would appreciate the Government's perspective on what terms in contracts between rightsholders and online content service providers are likely to be considered enforceable and/or unenforceable, under the Regulation.
8. Article 7(1) states that *"any contractual provisions [...] which are contrary to this Regulation, including those which prohibit cross-border portability of online content services or limit such portability to a specific time period, shall be unenforceable"*. Whilst in many cases, whether a clause falls foul of this prohibition will be clear-cut, TVPlayer would appreciate Government's guidance as to the breadth of its application. This is particularly important from an online content service provider's perspective, as without this clarity, TVPlayer is likely to find that the line between compliance with its obligations under the Regulation on the one hand, and respecting the contractual provisions and intellectual property rights of its licensors on the other, is a difficult line to tread – especially as the ramifications from infringing copyright in the UK, acknowledged by Government in its consultation document, can constitute a criminal offence.
9. For example, clauses triggering renegotiation in the event of a regulatory change are widespread in the sector. Should the industry be concerned that such clauses might be unenforceable? Or can the industry rely on the fact that such clauses do not explicitly prohibit portability mean that they would be enforceable? Likewise, would a prohibition on marketing the fact that portability is available be enforceable, given that it doesn't prohibit the online content service provider from

offering portability, merely from advertising that fact? These questions arise in particular because the Regulation implies that Article 7(1) should be interpreted broadly (see Recital 25). TVPlayer welcomes any guidance as to whether the interpretative approach will be as broad as, for example, restrictions on competition.

Enforcement

10. TVPlayer agrees that the use of existing legal enforcement mechanisms is sensible. Subject to portability enduring post-Brexit, TVPlayer also agrees that a 5-year review period is proportionate and would be sufficient to assess the application of those enforcement mechanisms.
11. However, TVPlayer would be interested to know whether Government considers it is permissible under the terms of the Regulation (and EU law) to provide any sort of defence in respect of failure to meet verification requirements? If not, even if an online content service provider uses its best endeavours to undertake verification and comply with the Regulation, but fails to do so, that online content service provider could face civil or criminal liability for copyright infringement for example, as the legal fiction will no longer apply. We would welcome any thoughts Government has on ensuring the right balance is struck between the need for verification measures and enforcement action for failure to achieve it, and the method of achieving verification being technology-driven, where the sanctions for any such failure should be proportionate with the damage caused.

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