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European Commission Announces Its Intention to Regulate Cross-Border Portability of Online Content

The EC's attempt to harmonize copyright across Europe raises questions for both content providers and consumers.

Readers may recall that on 6 May 2015 we issued an [update](#) notifying the European Commission (EC)'s publication of its Digital Single Market Strategy for the European Union (EU).

On 9 December 2015, the EC followed up on the principles enunciated in that Strategy by announcing its [proposals](#) to pass an EU-wide Regulation to ensure the portability of online content across the EU. Such a Regulation will override territorial copyright laws. The proposed Regulation will require that providers of online content services enable consumer subscribers resident in one Member State access and use of their online content services when temporarily present in another Member State. Any contractual provisions incompatible with this Regulation when passed will be unenforceable.

Several issues arise from this proposed Regulation which are left unresolved by the EC's announcement and will be of concern for content creators, licensors and licensees, financiers and consumers:

Temporary presence:

"Temporary presence" is defined in the draft Regulation as meaning a subscriber is present in a Member State other than his or her Member State of residence. There is no time limit proposed on "temporary presence" — can the concept easily be confined to paying subscribers of a service who are truly temporarily away from their home country? Does the lack of clarity expose providers to liability to both subscribers and the holders of copyright or related rights? What obligation does the definition impose upon the provider to verify that the subscriber is registered in one country and temporarily located in another, and does the processing of personal data to achieve these ends potentially conflict with data protection directives? The draft Regulation states that the provision of an online content service to a consumer with a temporary presence in another Member State "shall be deemed to occur solely in the Member State of residence" of that consumer to avoid providers being in breach of local copyright, data protection and other consumer laws.

Timing:

The EC's stated intention is to pass the Regulation (having been through the EU legislative process first) in Spring 2016, with the Regulation coming into force six months after its publication in the official EC Journal, at or around

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the same time roaming charges are banned in the EU (early to mid-2017). What is the impact on the 3,600 European video-on-demand providers, and will they struggle to adapt their platforms, policies and systems in time?

Pricing:

Will these proposals have a price impact on providers and consumers? The EC's position is that the proposal would not require the online content services provider to take any measure to ensure the quality of delivery of such services outside the subscriber's Member State of residence. Moreover, service providers that offer services free of charge will have to provide for cross-border portability if they "verify" the subscriber's Member State of residence, which also raises an issue as to what verification means in this situation. For example, how does this proposal impact public service providers such as the BBC and its iPlayer? The proposal covers providers which receive indirect payment, which may include the BBC licence fee.

Territorial Licensing:

Is this proposal the thin end of the wedge? Our view has been that portability was always going to be a relatively simple proposition to achieve within the context of EU law. But will portability lead to a breakdown of territorial licensing per se?

The EC has used its announcement as its action plan to make EU copyright fit for the digital age. The EC announced that the next package of measures is due to follow in Spring 2016, including:

- Enhancing cross-border distribution of television and radio programs online in light of the EC's recent review of the Satellite and Cable Directive 93/83/EEC by:
 - potentially extending that Directive so that online broadcasting, like satellite broadcasting, will only require copyright clearance in the "country of origin" of the broadcast; and
 - helping mediate between rightsholders and distributors to reach agreement on licenses that allow for cross-border access to content and on cross-border requests by interested users from other Member States. In this regard the EU might apply to these situations the new alternative dispute resolution systems adopted pursuant to recent Directive 2013/11/EU on alternative dispute resolution for consumer disputes and Regulation No 524/2013 on online dispute resolution for consumer disputes.
- Facilitating the digitalization of "out-of-commerce" works (works that, while still under copyright protection, are not available to the public through the usual channels of distribution (e.g. books that publishers have ceased to print and sell)) by making such out-of-commerce works easier to digitize and make available throughout the EU.
- Promoting tools to bring more European works into the single market through licensing hubs and aggregators of online search tools. An example of the former is the International Cinema Exchange project which is developing a cloud of films offering users unlimited access subject to a "territory tracker" linking user access to a film to the corresponding mechanisms of rights' management applicable in the Member State where the user is located. The latter is being developed by the European Observatory on Infringement of Intellectual Property Rights and aims to improve findability of European films and of the online services where they can be watched legally, as well as offering toolkits to enable creation of such tools where they do

not exist today in Member States.

- Plans to explore, via a structured industry cooperation forum, alternative models of financing, production and distribution in the animation sector that are scalable at the European level.

These initiatives indicate the EC's intention to continue to harmonize copyright across the EU. However, of particular interest to content creators and distributors, the EC made no specific reference to film and other audiovisual content financings by means of territorial licensing, nor to prohibiting geo-blocking in the EU, which may mean the fierce opposition by content creators and providers to these proposals mooted in May's announcement has been heard.

We will continue to monitor the EU's proposals, and will send further updates as more details are provided.

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