

# **The EU Portability Regulation: One Small Step for Cross-Border Access, One Giant Leap for Commission Copyright Policy?**

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## **Abstract**

*This article seeks to demonstrate that the newly proposed Portability Regulation, intended to permit access to online works legally available in one Member State when the user travels to another Member State, represents a cautious first step towards significant copyright reform in the EU. While there are some ambiguities in the proposal that require scrutiny, the Commission has nevertheless made its first concrete step towards addressing issues of territoriality in copyright law.*

## **Introduction**

How many readers of this journal have found that when travelling for business, they are not able to watch the latest episode of their favourite TV show normally available through services like the BBC iPlayer or other online ‘TV catch-up’ services provided by their national television networks? How many have travelled overseas for a family holiday, enjoying the sun but nevertheless feeling a pang of regret over missing a local, regional or national sporting event? For many Internet users, who have found themselves increasingly mobile across borders, who increasingly possess mobile devices with wireless and cellular access to the Internet, the fact that services that they have legally subscribed to are not accessible when they step foot outside their national borders is a somewhat incomprehensible one. The nature of copyright as a territorial right, even within the EU, subject to national licensing requirements and national exploitation makes cross-border access to content difficult, even where the range and availability of inexpensive, legal means of accessing such content has proliferated over the past decade. That content produced and licensed in Italy cannot be accessed by an individual in the UK, despite being willing to pay for access to such content already creates a significant hindrance upon the realisation of a single market for digital media in the EU; that the same individual could happen to travel to Italy, only to find that access to content legally paid for in the UK is no

longer available not only constitutes a hindrance but, to quote the late Sir Terry Pratchett, an ‘embuggerance’. However, recent moves by the European Commission appear to indicate that the European institution is well aware of the discontent that these digital borders are creating for European consumers. Based upon the earlier announced Digital Single Market Strategy<sup>1</sup>, a series of measures intended to ‘modernise’ the EU’s copyright framework, the Commission announcing that as a small part of this agenda, users legally subscribing to an online content service in one Member State (MS) should be able to retain access to that service when temporarily present in another MS. While this does little in itself to tackle the issue of territoriality of copyright and the subsequent hindrances to the development of a single market for digital media, it nevertheless constitutes a heartening first step.

### **The Portability Regulation Proposal: - Cautiously Ambitious, or Ambitiously Cautious?**

The Portability Regulation constitutes the first concrete legislative proposal published under the auspices of the Digital Single Market Strategy, a mere seven months after the announcement of the Strategy itself. Aside from the speed with which the Commission is working in this field, perhaps the most surprising dimension of the Proposal by the Commission on Portability is the legal instrument chosen to facilitate cross-border access to works. In proposing a Regulation, legally binding on all MSs without the requirement of national transposition as dictated by Article 288 of the Treaty on the Functioning of the European Union, the Commission appears to be seeking to prevent any potential deviations from the proposed text. Indeed, in its explanatory text accompanying the proposal, the Commission states that a Regulation would ensure that laws facilitating the portability of content would enter into force at the same time, and “guarantee that right holders and online service providers from different MSs are subject to the exact same rules”<sup>2</sup>. In comparison to earlier, more cautious initiatives, the Portability Proposal introduces a maximum harmonisation approach, with the Commission stating in its Impact Assessment that proposing a Directive would result in “a high risk that the conditions for access to the

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<sup>1</sup> European Commission, ‘A Digital Single Market Strategy for Europe’ COM(2015) 192.

<sup>2</sup> European Commission, ‘Proposal for a Regulation on Ensuring the Cross-Border Portability of Online Content Services in the Internal Market’ COM(2015) 627 4.

relevant subscription services would be different for consumers when travelling to different MS”<sup>3</sup>.

The proposed Regulation is a short document, containing twenty-nine recitals but only eight Articles, of which six could be considered as central to the functioning of the Regulation, with Article 6 on the treatment of personal data constituting a general obligation to act in accordance with existing data protecting laws<sup>4</sup> and Article 8 mandating that the Regulation would enter into force twenty days after publication in the Official Journal of the European Union, and then apply throughout the EU six months later. Article 1 sets out the objective of the Regulation, which is to ensure that “subscribers to online content services in the Union, when temporarily present in a MS, can access and use these services”. This gives rise to two thoughts; the first of these is that the objective itself is not made immediately clear, and depends on being read in conjunction with Article 2, which provides definitions to terms used in Article 1. The second is that while the Commission is demonstrably ambitious in its *choice* of legal instrument, its *objectives* are somewhat more cautious. The purpose of the Regulation is not to create a pan-European system of access to digital media, irrespective of national borders. The Regulation does little to change the current territorial nature of copyright, or indeed substantive copyright law in any way, but instead requires that where content is subscribed to in one MS, it can then be accessed when the subscriber travels to another MS. Indeed, under Article 4, for the purposes of licensing of content from copyright holders, access to the service will be deemed to occur solely in the MS of residence. This is to be achieved through obligations placed upon content providers under Article 3, which requires that online content providers enable subscribers to access and use that online content service when temporarily present in another MS, whether that constitutes news, Scandinavian crime dramas or sporting events. This does not impose a guarantee of home state quality upon the content provider however, with the Commission arguing that the intention of Article 3 is to ensure that a

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<sup>3</sup> European Commission, ‘Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council to Ensure the Cross-Border Portability of Online Content Services in the Internal Market’ (2015) SWD(2015) 270 25.

<sup>4</sup> Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data and Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, respectively

“provider shall not be liable if the quality of delivery of the service is lower, for instance due to limited internet connection”<sup>5</sup> in the state in which they are temporarily present.

Yet what guidance is given for terms such as ‘MS of residence’ and ‘temporarily present’? The terms are explained in Article 2 of the Regulation, which provides definitions intended to ensure uniform interpretation throughout the EU<sup>6</sup>, state that a subscriber is to be considered as any consumer who “on the basis of a contract for the provision of an online content service with a provider, may access and use such service in the MS of residence”. For the purposes of the Regulation, this also covers services “the main feature of which is the provision of access to and use of works, other protected subject matter or transmissions of broadcasting organisations, whether in a linear or on-demand manner”, so long as they are either provided **online** upon the basis of payment of money, or where the subscriber’s MS of residence is verified by the provider, in the case of non-payment services. The Regulation does not address non-Internet based means of disseminating audiovisual works, which remain governed by the Satellite and Cable Directive<sup>7</sup>, which is to be subject to its own review and potential revision<sup>8</sup>. This broad definition of online content service in the proposed Regulation means that services such as Netflix or Amazon’s Prime on-demand video service are covered by virtue of being provided on the basis of a fee-paying subscription. Free-to-view services not subject to residency verification would ostensibly not be covered; however, the Commission in recital 17 indicates that this verification of residency may be by means of information such as license feeds or contracts for telephone connection, “IP address or other means of authentication”. This will be relied upon if they “enable the provider to have reasonable indicators as to the MS of residence”.

This dimension of the Regulation is somewhat unclear. By way of example, the BBC iPlayer produces something known as the ‘Outside UK’ error message when a user tries to access the service from outside the UK. As the BBC states with regard to the Outside UK error,

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<sup>5</sup> European Commission, ‘Proposal for a Regulation on Ensuring the Cross-Border Portability of Online Content Services in the Internal Market’ (n 2) 8.

<sup>6</sup> *ibid* 7.

<sup>7</sup> Directive 98/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

<sup>8</sup> More general information can be found at European Commission, ‘The Satellite and Cable Directive - Digital Agenda for Europe’ (*Digital Agenda for Europe*, 26 November 2015) <<http://ec.europa.eu/digital-agenda/en/satellite-and-cable-directive>> accessed 21 January 2016.

“because of the way BBC iPlayer is funded, only users with registered UK IP addresses can access our programmes”<sup>9</sup>. Therefore, IP addresses outside of the UK range cannot be used to access this service (i.e., geo-blocking). However, when discussing the proposed Regulation, the BBC states that the Commission has confirmed “BBC's iPlayer would be exempt from the rules because it does not verify a user's country of residence”<sup>10</sup>. This does not appear to be correct based upon the way in which geo-blocking works – as previously mentioned, when using the iPlayer, if a user tries to access the service from outside the UK, the user is informed that their IP address indicates that they are not in the UK – if, however, someone is in the UK, they are then able to access the service. The counter-argument to this may be that this IP check does not verify the individual’s **residence**, only their **presence**<sup>11</sup>, and therefore does not constitute a residence check, meaning that the BBC falls outside of the remit of the proposed Regulation. However, *if* this is the case, then this leads to the conclusion that an IP address cannot function as a verification of residence<sup>12</sup>, only of an individual’s presence in a particular MS. This would then mean that the Commission’s statement in the Impact Assessment that an IP address can act as a proxy for establishing habitual residence<sup>13</sup> is inaccurate, and that furthermore recital 17 of the proposed Regulation should be changed to either omit reference to IP address, or alternatively, reworded as an additional requirement rather than a singular requirement as it appears to be through the use of the word ‘or’. Alternatively, if an IP address were to be considered a reasonable indicator of residence, this would mean that any geo-blocking based on a range of IP addresses would constitute ‘verification of residence’ for the purposes of the Regulation, resulting in services such as the iPlayer being included. Indeed, any online audiovisual media service using geo-blocking based on IP address ranges would be covered by the Regulation, with only those services using no verification at all being excluded – as access to these would already be possible due to the absence of any geo-blocking measure,

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<sup>9</sup> BBC, ‘Outside UK - Why Does iPlayer Think I’m Outside the UK?’ (*BBC iPlayer Help*, 2016) <[http://iplayerhelp.external.bbc.co.uk/tv/in\\_the\\_uk\\_message](http://iplayerhelp.external.bbc.co.uk/tv/in_the_uk_message)> accessed 21 January 2016.

<sup>10</sup> Kevin Rawlinson, ‘Netflix and Other Services to Be Available on Holiday’ (*BBC News*, 9 December 2015) <<http://www.bbc.co.uk/news/technology-35051054>> accessed 21 January 2016.

<sup>11</sup> The concept of ‘temporary presence’ in the Regulation will be discussed below.

<sup>12</sup> On this point, it must also be considered that an IP address can be misleading with regard to presence as well as residence, particularly with the use of techniques such as IP spoofing, as well as the use of Virtual Private Networks; on this, see Benjamin Farrand, ‘The Digital Economy Act 2010: A Cause for Celebration or a Cause for Concern?’ (2010) 32 *European Intellectual Property Review* 536.

<sup>13</sup> European Commission, ‘Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council to Ensure the Cross-Border Portability of Online Content Services in the Internal Market’ (n 3) 24.

the Regulation would not serve any particular purpose as they do not pose any significant barrier to cross-border media access to residents and non-residents. In revisions to the Regulation, ambiguity with regard to the use of IP addresses as a means of residence verification must be resolved.

Another potential problem with the Regulation is that while “MS of residence” is defined as the MS in which the consumer is habitually residing, and “temporarily present” as the “presence of the subscriber in a MS other than the MS of residence”, this wording of temporarily present does not make reference to any length of time. Rosati at the IPKat blog has pondered whether “a week can be temporary enough for the sake of the Regulation, while a month would be too long?”<sup>14</sup>, whereas Rose and Potts at fieldfisher state that temporarily has been given “a wide interpretation and appears to mean anything other than permanent residency”<sup>15</sup>. Indeed, given the movement of individuals throughout the EU, there are many different ‘temporary’ circumstances that the Regulation seeks to cover – from the company executive who travels to another MS for a two-day meeting, or the family going on a two-week summer holiday, students studying in another MS as part of an Erasmus exchange, or even posted workers. To impose a strict time limit upon when a subscriber is deemed to no longer be ‘temporarily resident’ could serve to defeat the purpose of the Regulation. On this point, the Commission Impact Assessment states that the “main defining feature is that such presence does not change the habitual residence of the subscriber”<sup>16</sup>, and that the objective of the Regulation would not be served by “fixed period of temporary presence which would imply checks on the exact duration of consumers’ presence in [another] MS”<sup>17</sup>.

Yet Article 5(2) appears to provide for certain types of checks, stating that right-holders may make use of “effective means” to ensure that a subscriber is only temporarily present

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<sup>14</sup> Eleonora Rosati, ‘EU Commission Unveils next Steps for Copyright Reform, Including Draft Content Portability Regulation’ <<http://ipkitten.blogspot.co.uk/2015/12/breaking-eu-commission-unveils-next.html>> accessed 18 January 2016.

<sup>15</sup> Nick Rose and Beverley Potts, ‘Content Portability Regulation’ (*fieldfisher*, 16 December 2015) <<http://www.fieldfisher.com/publications/2015/12/content-portability-regulation>> accessed 18 January 2016.

<sup>16</sup> European Commission, ‘Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council to Ensure the Cross-Border Portability of Online Content Services in the Internal Market’ (n 3) 24.

<sup>17</sup> *ibid* 25.

in another MS, rather than having changed their habitual MS of residence, so long as the required means are “reasonable and do not go beyond what is necessary to achieve their purpose”. The Regulation does not provide any guidance however, and states that the means by which temporary residence is to be determined would be left to right-holders and content providers<sup>18</sup>. This does not seem satisfactory, given the desire expressed by the Commission to ensure uniformity and consistency in the Regulation’s application; by leaving this to private arrangements, the terms and conditions applied to checks of ‘temporary presence’ may be different depending on the right-holders, the content providers, and potentially the MS in which the content is licensed. For example, the BBC has announced that it will allow UK TV license holders to access the iPlayer from outside the UK, with *The Times* stating before the publication of the Proposal that this would be facilitated by an access code, albeit one that would expire after “several weeks”<sup>19</sup>. There is also the question of content provided by different right-holders to the same content provider, such as Netflix – for example, what is *House of Cards*, produced as a Netflix Original series, could be accessed from outside the UK indefinitely, while a popular series like *Daredevil*, licensed from Disney since its acquisition of Marvel, may only be available for two weeks outside of a country of origin? Or to take another example, suppose that Disney permitted its content to be accessed for six months while ‘temporarily present’ in another MS if the habitual MS of residence was the UK, but only three months if it was France? This would risk dissimilar conditions being applied to consumers in different MSs of the EU, as well as doing little to resolve issues regarding cross-border access to media. Furthermore, more clarity is required regarding the technical means to determine whether someone is habitually resident, or temporarily present. Would this be by IP address range, in which the individual would have to return to their home state in order to log into the service? This raises concerns as to what the IP address proves – is it residence or presence? It would appear inconsistent for it to be considered proof of presence when considering whether a service is verifying an individual’s residence, but proof of residence when requiring a check as to whether someone who has left their own MS is just temporarily present in another.

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<sup>18</sup> *ibid.*

<sup>19</sup> Elizabeth Rigby, ‘BBC Plans Secret iPlayer Codes to Let Britons Watch TV Abroad’ *The Times* (London, 3 October 2015) <<http://www.thetimes.co.uk/tto/sport/article4574927.ece>> accessed 21 January 2016.

## What the Future May Bring

As may be evident from the previous section, the criticisms levelled in this article against the proposed Regulation are technical in nature, rather than against the objectives of the Regulation in its entirety. Indeed the ambition demonstrated by the Commission to give legal effect to the stated goal of bringing down barriers to the realisation of a digital single market, an initiative that has been subject to several false starts, is commendable. The Regulation constitutes a cautious first step, seeking only to ensure that the rights afforded to subscribers to an online content service in one MS retain those already existing rights when they happen to travel. Some content right-holders seem favourably predisposed to the Regulations, with the chairman for the Alliance for Intellectual Property referring to the move as “a huge opportunity for the UK’s creative industries”<sup>20</sup>. Similarly, content providers such as Sky released a statement commenting that “we will need to consider the plans in detail, but we welcome anything that helps customers get even more value from their subscriptions”<sup>21</sup>. In comparison, other right-holders seem somewhat more sceptical; a representative of PACT, a trade body for content producers, stated that “any intervention that undermines the ability to license on an exclusive territorial basis will lead to less investment in new productions and reduce the quality and range of content available to consumers”<sup>22</sup>. In essence, some content producers are concerned that this first step constitutes the first assault upon territoriality in copyright. If copyright reforms begin with the extension of a consumer’s rights across a national border when they travel, how long until this incremental step leads to a belief that consumers should be able to access content anywhere in the EU? As Batchelor et al. comment, this view is based upon a perception that measures that seek to limit the impact of territoriality of copyright, including prohibiting geo-blocking, undermines the way in which content is created and financed<sup>23</sup>. This would impact, for example, the charging of different prices in different regions<sup>24</sup>, or the practice of content ‘windowing’, in which content is gradually made available in MSs subject to time

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<sup>20</sup> Rawlinson (n 10).

<sup>21</sup> *ibid.*

<sup>22</sup> Martin Blaney, ‘EC Unveils Controversial Content Portability Plans’ (*ScreenDaily*, 9 December 2015) <<http://www.screendaily.com/news/digital/ec-unveils-controversial-content-portability-plans/5097809.article>> accessed 23 January 2016.

<sup>23</sup> Bill Batchelor, Ben Allgrove and Mark Agnew, ‘Digital Disruption: The Practical Implications of the EU’s Digital Single Market Agenda’ (2015) 36 *European Competition Law Review* 379, 379.

<sup>24</sup> *ibid* 380.

delays, which “allows firms to co-ordinate and maximize profit-enhancing publicity and to take advantage of particular market idiosyncrasies”<sup>25</sup>. One such example in the UK is that while series 8 of Doctor Who, a particularly popular BBC-produced science-fiction series, has been available on Netflix in Germany, Switzerland, the US, Canada, Australia and New Zealand since August 2015<sup>26</sup>, Netflix subscribers in the UK do not yet have access. Furthermore, content providers appear to be limiting subscribers’ abilities to circumvent this windowing, through blocks on the use of VPNs; in January 2016, Netflix announced that it would be introducing measures to prevent the use of VPNs to access its service, allegedly at the behest of content producers concerned about these circumventions<sup>27</sup>. This has followed the BBC blocking access to its iPlayer through VPNs since October 2015, when it launched a US-based version of the service<sup>28</sup>.

The Portability Regulation does not address this issue, instead only permitting for access to content legally subscribed to in the MS of habitual residence. However, on the same day as the Portability Regulation proposal was published, the Commission also published a Communication titled “Towards a Modern, More European Copyright Framework”<sup>29</sup>. This Communication at a discursive level suggests that the small step of content portability is part of a giant leap for copyright reform regarding cross-border access, arguing that “a more European framework is needed to overcome fragmentations and frictions within a functioning single market”<sup>30</sup>. The Commission itself refers to the Portability Regulation as only constituting a “very short term” action<sup>31</sup>, stating that it intends to “inject” more single market into current EU copyright rules, including addressing issues of territoriality, as well as adapting copyright rules to new technological realities<sup>32</sup>.

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<sup>25</sup> Claude E Barfield and Mark A Groombridge, ‘The Economic Case for Copyright Owner Control over Parallel Imports’ (1998) 1 *The Journal of World Intellectual Property* 903, 929.

<sup>26</sup> James McArthur, ‘Is Doctor Who Season 8 on Netflix?’ <<http://www.netflixupdate.com/is-doctor-who-season-8-on-netflix/>> accessed 23 January 2016.

<sup>27</sup> Julia Greenberg, ‘Netflix’s VPN Ban Isn’t Good for Anyone—Especially Netflix’ (*WIRED*, 16 January 2016) <<http://www.wired.com/2016/01/netflixs-vpn-ban-isnt-good-for-anyone-especially-netflix/>> accessed 23 January 2016.

<sup>28</sup> KG Orphanides, ‘BBC iPlayer VPN Access Blocked ahead of US Launch (Wired UK)’ (*Wired UK*, 20 October 2015) <<http://www.wired.co.uk/news/archive/2015-10/20/bbc-iplayer-vpn-access>> accessed 23 January 2016.

<sup>29</sup> European Commission, ‘Towards a Modern, More European Copyright Framework’ COM(2015) 626.

<sup>30</sup> *ibid* 2.

<sup>31</sup> *ibid* 2–3.

<sup>32</sup> *ibid* 3.

## **Concluding remarks**

The proposal for a Regulation on Content Portability appears at first glance to be a comparatively unambitious, even cautious incremental step away from the status quo, in which cross-border access to audiovisual media works is severely restricted. However, placed in the context of the Digital Single Market Strategy, and the Commission's own acknowledgement that the Regulation is a short-term measure, there is hope that we are seeing the beginning of a much more ambitious initiative for copyright reform in the EU. As the Commission states at the end of its recent Communication, "the full harmonisation of copyright in the EU, would require substantial changes in the way our rules work today [...but these] complexities cannot be a reason to relinquish this vision as a long-term target"<sup>33</sup>. With such a view being expressed by an institution that in has previously taken a very cautious approach to legal reform of territoriality of copyright, while the Regulation may constitute one small step for cross-border access, it may nevertheless be one giant leap for Commission copyright policy.

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<sup>33</sup> *ibid* 12.