

The new EU Regulation on cross-border portability of online content services: towards a pan-European system of copyright licenses?

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Since the launch in 2015 of the ambitious Digital Single Market Strategy, aimed at improving access to digital goods and services and maximising the growth of the digital economy in the internal market¹, the European Commission has taken several steps to implement it. Some of these, in light of the close interconnection between the digital world and copyrighted works, will have a direct impact on copyright protection in the European Union ("EU"), such as the Proposals for a Copyright Directive², the "Sat Cab 2" Regulation³ and the Proposal to amend the Audiovisual Media Services Directive⁴.

The Regulation on cross-border portability of online content services in the internal market (the "Regulation")⁵, approved last May and applicable from 2018⁶, falls within the framework of the Strategy, and requires online content services providers to allow their EU-resident subscribers to access these services even when temporarily present in a Member State other than the one of residence.

1. Scope of application

In detail, the Regulation will apply to (i) audiovisual media services⁷ or to services the main feature of which is the provision of access to, and the use of, copyrighted works, other protected contents or transmissions of broadcasting organisations, whether in a linear or non-linear mode⁸, (ii) which are portable, meaning they are accessible by subscribers regardless of their physical presence in a specific place, (iii) lawfully provided (meaning not provided in violation of the proprietary rights over the contents of the service, nor of other third-party rights), (iv) through the internet, (v) on a pay basis⁹, (vi) to consumers who reside in a Member State and (vii) who are temporarily present in another Member State¹⁰.

¹ European Commission, "A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen", Press release, Brussels, 6 May 2015, available at http://europa.eu/rapid/press-release_IP-15-4919_en.htm [last visited: 29 June 2017].

² Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593 final, Brussels, 14 September 2016, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0593&from=IT> [last visited: 29 June 2017].

³ Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, COM(2016) 594 final, Brussels, 14 September 2016, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0594&from=IT> [last visited: 29 June 2017].

⁴ Proposal for a Directive of the European Parliament and of The Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287 final, Brussels, 25 May 2016, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0287&from=IT> [last visited: 29 June 2017].

⁵ Regulation of the European Parliament and of the Council on cross-border portability of online content services in the internal market, PE-CONS 9/17, 2015/0284 (COD), 24 May 2017, available at <http://data.consilium.europa.eu/doc/document/PE-9-2017-INIT/en/pdf> [last visited: 29 June 2017].

⁶ According to article 11(2), the Regulation will apply nine months after the date of its publication in the European Union Official Journal.

⁷ As defined by article 1, letter a) of Directive 2010/13/EU: "(i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph; (ii) audiovisual commercial communication".

⁸ This is the definition contained in article 2, n. 5 of the Regulation.

⁹ Providers offering these services on a free basis can (but do not have to) opt into the Regulation.

¹⁰ This obligation will therefore not include mere intermediaries in the delivery of online content services, such as Internet Service Providers (e.g. Youtube) and operators providing the mentioned contents only in an ancillary manner (such as, for example, the editors of websites using audio or video works as graphical elements or background to those websites, see Recital 16 of the Regulation).

The service must be provided to subscribers temporarily present in a Member State other than the one of residence in the same way and with the same contents available in the Member State of residence, and without any additional charges¹¹.

A precondition for the cross-border portability of the relevant services will be the preliminary verification of the Member State of residence of the subscriber, with a view to protect copyrights, related rights and other exclusive rights on the delivered contents. The provider will have to verify the subscriber's residence through the technical means listed by the Regulation¹² and, if such verification is impossible to carry out (e.g. in case of the subscriber's refusal to submit his/her data), the subscriber will not be able to access the service across the border¹³. With a view to protection of privacy, providers can only collect the information necessary to determine the subscriber's Member State of residence and must destroy it on completion of the verification process.

It is important to underline that the Regulation will have a mandatory and retroactive effect on the whole of the EU. Therefore, any provision in the contracts entered into by the providers with the rights owners (and/or with the subscribers) that conflicts with the Regulation, will be invalid¹⁴, even if the contracts are governed by legislation of extra-EU countries that allow exclusive and absolute territoriality¹⁵. In this way cross-border portability of online content services will become a sort of public policy of the EU.

2. Legal impact

In only 11 articles, the Regulation could revolutionise the EU protection system of copyrights, related rights and other exclusive rights existing under the applicable law of any Member State on the contents delivered by the services contemplated by the Regulation (e.g. *sui generis* rights on databases, exclusive rights of the organisers of large sporting events).

The wording¹⁶ of the Regulation suggests that this revolution will be brought about through a sort of *fictio iuris*, according to which the delivery, access and use across the border of the relevant services will be deemed to occur in the subscriber's Member State of residence. However, Recital 7 requires that the Regulation is interpreted in a manner that is consistent with (*inter alia*) the TRIPs Agreement¹⁷, incorporating in turn the Berne Convention¹⁸, which expressly leaves the Acceding States free to set out copyright exceptions and limitations over and above those provided by the Berne Convention. Therefore, it would perhaps be more appropriate to talk about the introduction of a new copyright exception/limitation in EU law¹⁹, which has been introduced for the first time by means of a Regulation²⁰.

In any case, whatever the legal categorisation adopted, it is evident that the Regulation will in fact entail an extension in scope of the territorial licenses granted to the providers of the relevant services for all Member States where the subscribers to such services are temporarily present.

¹¹ This is without prejudice to the quality of the service delivered in the Member State other than the one of residence (article 3(3) of the Regulation), provided that the different quality delivered in such other Member State is not aimed, in fact, at avoiding the application of the Regulation (see Recital 21 of the Regulation).

¹² For instance identity card, bank account number, place of installation of a decoder, etc., see article 5 of the Regulation.

¹³ It is understood that the owners of the rights over the contents provided by the service will be free to authorise the delivery of those contents across borders even in the absence of the mentioned verification.

¹⁴ Articles 7 and 9(1) of the Regulation.

¹⁵ Article 7(2) of the Regulation.

¹⁶ See in particular Recital 23 and article 4 of the Regulation.

¹⁷ Agreement on the Trade Related Aspects of the Intellectual Property Rights, adopted in Marrakech on 15 April 1994, ratified by Italy with Law No. 747 of 29 December 1994.

¹⁸ Berne Convention for the Protection of Literary and Artistic Works, signed on 9 September 1886, reviewed in Berlin on 13 November 1908, in Rome on 2 June 1928, in Brussels on 26 June 1948, in Stockholm on 14 July 1967 and in Paris on 24 July 1971.

¹⁹ See also the wording of Recital 24 of the Regulation.

²⁰ And not by an international convention (e.g. Berne Convention) or by a Directive, which, by its very nature, leaves Member States a certain margin of discretion in its implementation.

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The removal of national borders in relation to accessing such digital services could, as a consequence, eliminate the scope of granting absolute, exclusive territorial licenses of rights on online contents in each Member State. The Regulation will therefore have a crucial impact on markets that rely on the granting of exclusive, absolute territorial licenses (e.g. production and distribution/communication to the public of cinematographic and, more generally, audio-visual works so-called “premium”)²¹ in order to maximise profit and cover high production costs.

The impact of the revolution is heightened by the vagueness of the notion of “temporary presence” of the subscriber in a Member State other than the one of residence²². In extreme cases, the subscriber could access the service from another country for months or even years, at least until the provider checks the IP address at their own discretion²³. Nor will the rights’ owners be able to check compliance with the verification obligations, given that providers are expressly forbidden from communicating the information collected during the verification process²⁴.

3. Conclusions

The removal of geo-blocking measures on the circulation of online contents in the internal market, which is the direct consequence of the Regulation, will have an impact on the markets based on the granting of absolute, exclusive territorial licenses, above all those relating to audio-visual works. This will necessitate a reconsideration of the entire business model of distribution/communication to the public of these works, and of the granting of the related licenses, for the internet.

In relation to the position of the service providers, the obligation to provide online content services in Member States that were not, often on business grounds, previously covered is likely to result in higher costs for the providers. These will arise from the need to implement technical measures necessary for the delivery of their services in such other countries and for the localization of their subscribers, as well as from the need to pay any higher royalties that may be requested by the rights’ owners in light of the territorial extension of the licenses that the application of the Regulation will entail; which costs could not be transferred to the subscribers by means of additional charges for portability²⁵.

In contrast, the subscribers to the services considered by the Regulation will benefit from being able to access their subscription on the same conditions and without additional charges in the whole EU.

In conclusion, the provisions of the Regulation seem to necessitate a revision of the business model of distribution/communication to the public of, primarily, audio-visual works, moving from the current system of absolute, exclusive territorial licenses to a system in which those licences will coexist with a supranational – in this case pan-European – system of non-exclusive territorial licenses. If this is the case, the Regulation represents a further step (e.g. *Murphy* judgment²⁶, *Barrier Directive*²⁷) by the European institutions towards the implementation of a pan-European system of licenses for copyright and other exclusive rights on online contents in the EU.

²¹ As regards the market for musical works, which is historically based on the granting of non-exclusive territorial licenses, most providers already allow cross-border access to online musical contents; see European Commission, “*Commission Staff Working Document – 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”*”, SWD (2015) 270 final, Brussels, 9 December 2015, p. 15, available at http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2015/swd_2015_0270_en.pdf [last visited: 29 June 2017].

²² Generically defined by article 2, n. 4 of the Regulation as presence “for a limited period of time”.

²³ See article 5(2) of the Regulation. Neither providers nor rights owners can set a contractual time limit on the cross-border portability of the online content services, in light of the express prohibition contained in article 7(1) of the Regulation.

²⁴ See article 8(2) of the Regulation.

²⁵ See article 3(2) of the Regulation.

²⁶ Court of Justice of the European Union, Grand Chamber, joined cases C-403/08 e C-429/08, *Football Association Premier League Ltd et al. vs QC Leisure et al. and Karen Murphy vs Media Protection Services Ltd*, 4 October 2011. In this case, the Court declared the unlawfulness of clauses contained in exclusive territorial licenses aimed at denying cross-border satellite access to the subscribers to sport contents lawfully acquired in the territory of a Member State other than the one where the subscription has been concluded.

²⁷ Directive 2014/26/EU of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (Text with EEA relevance), Brussels, 26 February 2014.