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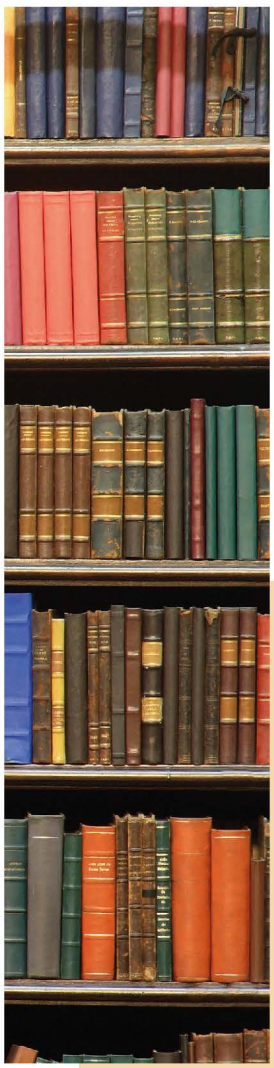

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The portability of online services as part of the modernisation of copyright in the European Union

IN-DEPTH ANALYSIS FOR THE JURI ANALYSIS

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

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LEGAL AFFAIRS

The portability of online services as part of the modernisation of copyright in the European Union

IN-DEPTH ANALYSIS

Abstract

Upon request by the JURI Committee, this In-depth-Analysis identifies and analyses the recent proposal of the European Commission concerning a regulation on ensuring the cross-border portability of online content in the internal market, COM(2015)627 in the context of the modernisation of EU-Copyright rules.

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CONTENTS

GENERAL INFORMATION

KEY FINDINGS

- **The application of EU law to copyright** calls for the reconciliation of the territoriality principle, which governs intellectual property, with that of the EU single market, particularly where the connected digital single market is concerned.
- The proposal for a regulation on the cross-border portability of online content services in the internal market **is a step towards this reconciliation**, as it facilitates the free movement of content or services to the benefit of EU citizens who travel in the Union.
- The proposal is innovative in the area of copyright because of the choice of legal instrument, which in this case is a **regulation**.
- The vagueness surrounding the **purpose of travel** within the Union should be corrected by an express provision stating that 'travel for leisure, business and study' is covered.
- The proposal calls for more specific wording given the lack of express restrictions on the **'temporary'** nature of travel within the Union.
- The **definition of 'Member State of residence'** as the Member State in which the subscriber has his 'habitual' residence should be expanded to specify that it is the Member State to which the subscriber 'regularly returns'.
- A requirement should be imposed on service providers to **verify** their subscribers' actual **Member State of residence**. To that end, an annual declaration should be completed by the subscriber using a combination of reasonable but verifiable stability indicators. If the subscriber fails to send this minimum verifiable information, he would not be entitled to cross-border portability.
- The proposal **does not engender any contradiction** between the territoriality principle and the measures aiming to remove the obstacles to content portability.

1. GENERAL FRAMEWORK

1.1. The basic principle of the intellectual property

Whether we like it or not, the domain of intellectual property is still affected by the general principle of territoriality, which is applicable to copyright, trademarks, patents, design rights and other industrial property rights.

According to the principle, the content and extent of exclusive rights to creations or innovations are confined to the geographical territory in which those rights were established. This principle derives from the international conventions, most important of which as regards copyright is the Berne Convention for the Protection of Literary and Artistic Works[1]. While not a contracting party to the Berne Convention, the European Union is nonetheless obliged, under Article 1(4) of the WIPO Copyright Treaty, to which it is a party, to comply with Articles 1 to 21 of the Convention[2].

1.2. The basic principle of the European Union

One of the European Union's overarching objectives is to establish an internal market comprising an area without internal borders in which the free movement of goods, services, capital and people is guaranteed in accordance with the Treaties[3].

From that perspective, the fact that any kind of national borders still exist appears to be an obstacle which should be overcome.

One of these obstacles could arise from copyright based on the principle of territoriality, which leads to the fragmentation of legislation and national practices in this area.

1.3. The general application of EU law to copyright

It is understood that the European Union has strived to remove these obstacles. In the past, a big step was taken in this direction by applying the principle of free movement of goods to copyrighted products, which implies the community exhaustion of copyright on copies sold legally within the Union[4]. The problems of free movement of goods have subsequently been regulated and adjudicated on by means of directives on the harmonisation of copyright[5] which formulate the principle of exhaustion in several of their

[1] Green paper on Television without frontiers, COM(84) 300 final, p. 301-303; Court of Justice, judgment of 14 July 2005 in the Lagardère case, C-192/04, paragraph 46, referring to 'the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty'; Court of Justice, judgment of 27 February 2014 in the OSA case, C-351/12, paragraph 73.
IVIR Report on 'The Recasting of Copyright & Related Rights for the Knowledge Economy', 2006, p. 21-23; J.P. TRIAILLE (ed.), Study on the application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf, p. 45-62.
[2] Court of Justice, judgment of 7 December 2006 in the SGAE v Rafael Hoteles case, C-306/05, paragraphs 3-6; Court of Justice, judgment of 16 July 2009 in the Infopaq v Danske Dagblades Forening case, C-5/08, paragraphs 3-5; Court of Justice, judgment of 18 March 2010 in the OSDD v Divani Akropolis case, paragraphs 3-6; Court of Justice, judgment of 4 October 2011 in the Premier League case, joined cases C-403/08 and C-429/08, paragraph 189; Court of Justice, judgment of 9 February 2012 in the Luksan v van der Let case, C-277/10, paragraph 59; Court of Justice, judgment of 26 April 2012 in the DR and TV2 Danmark v NCB case, C-510/10, paragraphs 28-29.
[3] Article 26 TFEU.
[4] F. Gotzen, 'La libre circulation des produits couverts par un droit de propriété intellectuelle dans la jurisprudence de la Cour de justice', *Revue trimestrielle de droit commercial et de droit économique* 1985, p. 467-481.
[5] The key judgment on intellectual property is that of the Court of Justice of 11 July 1996 in the Bristol-Myers Squibb case, joined cases C-427/93, C-429/93 and C-436/93, which enunciated the principle that 'Where Community directives provide for the harmonization of measures necessary to ensure the protection of the

articles[6]. This principle, combined with ad hoc interventions from competition law, helped resolve a great deal of tension.

However, 28 different copyright systems at national level continued to impede the consistent application of single market principles. Consequently this EU action was complemented by the harmonisation of national legislation on a number of other points. It was done in a gradual, careful and hesitant way. It was never possible to produce a text harmonising the whole sector comprehensively. No less than nine directives appeared, of which only **Directive 2001/29**[7] on the harmonisation of certain aspects of copyright and related rights in the information society, and **Directive 2006/115/EC**[8] on rental right and lending right and on certain rights related to copyright in the field of intellectual property, show a slightly more global approach to the subject[9]. The other directives regulate only small sectors of the field[10].

The situation could change if the Union decides to introduce a **European copyright code** one day. Such a global and consistent response to the challenges of the single market would be the only effective means of overcoming the principle of national territoriality of intellectual property systems as a whole[11]. In this way, the indispensable territoriality principle for intellectual property rights would be observed, but its geographical application would extend to the whole of the Union[12]. It may further be noted that the new proposal for

interests referred to in Article 36 of the Treaty, any national measure relating thereto must be assessed in relation to the provisions of that directive and not Articles 30 to 36 of the Treaty' (paragraph 25).

[6] Article 4(2) of Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5.5.2009; Article 9(2) of Directive 2006/115/EC of 12 December 2006, OJ L 376, 27.12.2006; Article 5(2) of Directive 96/9/EC of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20; Article 4(2) of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001.

[7] Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001 (the 'InfoSoc Directive').

[8] Directive 92/100 of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346/61, 27.11.1992, codified by Directive 2006/115/EC of 12 December 2006, OJ L 376, 27.12.2006.

[9] F. Gotzen, 'The European Legislator's Strategy in the Field of Copyright Harmonization', in: T.E. Synodinou, *Codification of European Copyright Law*, Information Law Series, Vol. 29, Kluwer Law International, Alphen aan den Rijn, 2012, p. 43-54.

[10] Directive 91/250 of 14 May 1991 on the legal protection of computer programs, OJ L 122, 17.5.1991, p. 42, codified by Directive 2009/24/EC of 23 April 2009, OJ L 111, 5.5.2009.
Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable transmission (OJ L 248, 6.10.1993, p. 15).
Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290, 24.11.1993, p. 9, codified by Directive 2006/116 of 12 December 2006, OJ L 372, 27.12.2006, amended by Directive 2011/77/EU of 27 September 2011, OJ L 265, 11.10.2011;
Directive 96/9/EC of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20;
Directive 2001/84/EC of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13.10.2001, p. 32; Directive 2012/28/EC of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012; Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014.

[11] B. Hugenholtz, 'Copyright harmonisation in the digital age : looking ahead', in M.C. Janssens –G. Van Overwalle, *Harmonisation of European IP Law*, CIR Collection No 23, Bruylant-Larcier, Brussels, 2012, p. 69-71. Cf. the letter of 19 December 2014 to Commissioner Oettinger from the European Copyright Society http://www.ivir.nl/syscontent/pdfs/78.pdf . It may be recalled that on 26 April 2010 the Wittem Group of European copyright scholars published a text entitled 'European Copyright Code' which offered the beginnings of a comprehensive approach. See http://www.copyrightcode.eu., with comments by Th. Dreier, 'Das WITTEM-Projekt eines European Copyright Code', Festschrift Loschelder, Cologne, 2010, p. 47-60; J. Ginsburg, 'European Copyright Code - Back to first principles (with some additional detail)', *Auteurs&Media* 2011, p. 5-21.

[12] For this reason the Commission had already envisaged the possibility of global regulation in this area. With that in mind the 'Reflection Document' of 22 October 2009 stated that: 'A Community copyright title would have instant Community-wide effect, thereby creating a single market for copyrights and related rights. It would overcome the issue that each national copyright law, though harmonised as to its substantive scope, applies only in one particular national territory. A Community copyright would enhance legal security and transparency, for right owners and users alike, and greatly reduce transaction and licensing costs. Unification of EU copyright by regulation could also restore the balance between rights and exceptions – a balance that is currently skewed by the fact that the harmonisation directives mandate basic economic rights, but merely permit certain exceptions

a regulation, discussed below, forms part of a broader action plan outlined in a Commission communication of 9 December 2015[13]. In the final section of this document the Commission outlines a 'long-term vision'. This vision comprises a bold, forward-looking conclusion concerning a 'complete harmonisation' of copyright rules. It would make authors and artists, creative industries, users and all those concerned with copyright, subject to the same rules, irrespective of where they are in the European Union. In this connection, the Commission concludes:

'The full harmonisation of copyright in the EU, in the form of a single copyright code and a single copyright title, would require substantial changes in the way our rules work today. Areas that have so far been left to the discretion of national legislators would have to be harmonised. Uniform application of the rules would call for a single copyright jurisdiction with its own tribunal, so that inconsistent case law does not lead to more fragmentation.

These complexities cannot be a reason to relinquish this vision as a long-term target. Notwithstanding the particularities of copyright and its link with national cultures, difficulties and long lead-times have also accompanied the creation of single titles and single rulebooks in other areas of intellectual property, notably trademarks and patents, where they are now a reality.

The EU should pursue this vision for the very same reason it has given itself common copyright legislation: to build the EU's single market, a thriving European economy and a space where the diverse cultural, intellectual and scientific production of Europe travel across the EU as freely as possible'.

It must be noted, however, that even in this future scenario contractual freedom and entrepreneurial freedom would remain, which could encourage a market operator to divide the licences granted or assign them exclusivity, subject to the application of the rules on the free circulation of goods, the freedom of competition and the free provision of services.

1.4. Targeted action by the Commission to modernise copyright in the European Union

Pending future developments, the current regulatory framework on copyright remains fragmented, with the resulting constraints. That is why the Juncker Commission outlined a number of targeted actions, one of which concerned a 'connected digital single market'. In order to achieve this, the Commission is working on '**modernising EU legislation** on copyright'.

It was in this context that, to castigate the continued existence of all kinds of national barriers, the Commission came up with the deliberately pejorative neologism 'geo-blocking', which prevents a connected digital single market from becoming a reality. The Commission recently defined the phenomenon in its **proposal for a regulation of 25 May 2016 addressing geo-blocking**[14] and other forms of discrimination based on customers'

and limitations. A regulation could provide that rights and exceptions are afforded the same degree of harmonisation'. (Creative Content in a European Digital Single Market: Challenges for the Future. A Reflection Document of DG INFSO and DG MARKT, p. 18-19.
Seehttp://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf. In a similar vein, see also the Commission Communication of 24 May 2011, 'A single market for intellectual property rights', COM(2011) 287, p. 14, and the Green Paper of 13 July 2011 on the online distribution of audiovisual works in the European Union, COM (2011) 427, p. 14. Question 78 in the public consultation launched by the previous Commission in December 2013, in which interested parties were asked to express their views on initiatives seeking to reform and modernise European copyright law, also concerned a possible European Copyright Code.

[13] 'Towards a modern, more European copyright framework', Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2015) 626 final.

[14] COM(2016) 289 final.

nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC. It believes that this practice occurs 'where traders operating in one Member State block or limit the access to their online interfaces, such as websites and apps, of customers from other Member States wishing to engage in cross-border commercial transactions' (recital 1). The blocking may result from a wide range of practices on the market, as shown by the first results of a **sector inquiry** by the Commission on e-commerce, published on 18 March 2016[15]. It can take the form of discrimination based on IP address, postal address or the country which issued a credit card.

If geo-blocking is linked to agreements made between suppliers and distributors, it may in some cases restrict competition in the single market, thus breaching EU rules on agreements. However, if the geo-blocking rests on commercial decisions taken unilaterally by a business which has decided not to sell its products or services abroad, it is clear that such behaviour is outside the EU legislative framework on competition which would then not apply, except in certain cases when the decision was taken by a dominant business in the market. There are a number of reasons why retailers and service providers may choose not to sell abroad, and the freedom for them to choose their commercial partners and define the geographical area in which they do business remains a fundamental principle of entrepreneurial freedom.

In its **proposal for a regulation of 25 May 2016** the Commission addresses **'unjustified'** geo-blocking. It does so in particular by introducing an obligation for traders not to block access to their online interfaces on the basis of their clients' residence and by outlining certain specific situations in which discrimination against clients on the basis of residence is banned.

While geo-blocking is not necessarily always unjustified, it raises the question of how to deal with issues surrounding the territorial application of **copyright**?

It would appear that some caution should be exercised in taking action in this area, which brings into play not only economic interests, but also the values of cultural, regional and linguistic diversity. Parliament already raised this in its **Resolution of 9 July 2015**[16]. It states that 'European cultural markets are naturally heterogeneous on account of European cultural and linguistic diversity and notes that this diversity should be considered as a benefit rather than an obstacle to the single market' (paragraph 16). Parliament notes 'that the existence of copyright and related rights inherently implies territoriality' while emphasising 'that there is no contradiction between that principle and measures to ensure the portability of content (paragraph 6). At the same time, Parliament 'calls for a reaffirmation of the principle of territoriality, enabling each Member State to safeguard the fair remuneration principle within the framework of its own cultural policy' (paragraph 7). Taking note of 'the importance of territorial licences in the EU, particularly with regard to audiovisual and film production which is primarily based on broadcasters' pre-purchase or pre-financing systems' it points out that 'the financing, production and co-production of films and television content depend to a great extent on exclusive territorial licences granted to local distributors on a range of platforms reflecting the cultural specificities of the various markets in Europe', and 'that being so, emphasises that the ability, under the principle of freedom of contract, to select the extent of territorial coverage and the type of distribution platform encourages investment in films and television content and promotes cultural diversity'. That is why it 'calls on the Commission to ensure that any initiative to modernise copyright is preceded by a wide-ranging study of its likely impact on the

[15] Geo-blocking practices in e-commerce - Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition, SWD(2016) 70 final.
[16] on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.(2014/2256(INI), P8_TA-PROV(2015)0273.

production, financing and distribution of films and television content, and also on cultural diversity' (paragraphs 17 and 13).

In its resolution of **19 January 2016**[17] 'Towards a Digital Single Market Act' Parliament addressed the issue again, cautioning in paragraph 38 'against indiscriminately promoting the issuing of mandatory pan-European licences since this could lead to a decrease in the content made available to users', while also highlighting 'that the principle of territoriality is an essential element of the copyright system given the importance of territorial licensing in the EU'.

The Commission seemed to share this caution when, for its 2015 consultation on geo-blocking, it decided to leave copyright and licence practices out of its questionnaire and make them the subject of separate initiatives. In addition, it should be noted that in its **proposal for a regulation of 25 May 2016**, the Commission excluded audiovisual services from the regulation's scope of application (recital 6). The prohibition of discrimination against clients on the basis of nationality, residence or place of establishment provided for under article 4 of the proposal does not apply to services 'the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter'.

Regarding copyright as such, the Commission decided to adopt a gradual approach and to proceed step by step. The first step is the proposal for a regulation on portability, on which we will comment now.

[17] P8_TA(2016)0009, 2015/2147(INI).

2. PROPOSAL FOR A REGULATION ON ENSURING THE CROSS-BORDER PORTABILITY OF ONLINE CONTENT SERVICES IN THE INTERNAL MARKET

2.1. Origin of the proposal

The Commission submitted the above-mentioned proposal to the Council on 9 December 2015. The proposal centres on its strategy for a digital single market, which aims to establish an internal market for digital content and services[18]. It is the first stage in an action plan seeking to adapt copyright to the digital era[19].

2.2. Choice of instrument for the proposal

It is worth drawing attention to the innovative nature of the method adopted for action in the area of copyright. Until now the Union has been content to use directives. Now, for the first time in the area of copyright, the Commission has opted for the instrument of a regulation. According to recital 28, 'only a regulation ensures the degree of legal certainty which is necessary in order to enable consumers to fully benefit from cross-border portability across the Union'.
If the proposal is adopted, therefore, it will be the first time that an EU legislative text on copyright is directly applicable without leaving any leeway to the Member States. They will no longer have to transpose the text into their national legislation, as is the case with directives, but will have to accept it in its entirety as an obligatory and uniform text which will enter into force everywhere at the same time. EU citizens will therefore be able to invoke it directly and courts in the 28 Member States will have to implement it immediately, as though it were national legislation.

2.3. Contents of the proposal

a) A limited legal fiction

While the proposition is, in a manner of speaking, revolutionary in its form, it is less so in its content. It confines itself to allowing citizens who, for business or pleasure, travel in the Union, to maintain their access to online content which they have legally purchased or subscribed to in their Member State of origin. This means that those who stay in another Member State temporarily will continue to have access to music, films, games or sporting events, for example, as if they were at home. The access will be considered to have taken place in the subscriber's Member State of residence, under the same legal conditions of use. Subscribers who are temporarily present in another Member State will therefore be able to access the service and use it in the same way that they would have legally been able to in their Member State of residence, including, where applicable, the same entitlement to legal downloads that they own legally in their Member State of residence.

[18] 'A Digital Single Market Strategy for Europe', Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2015) 192 final.
[19] 'Towards a modern, more European copyright framework', Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2015) 626 final.

The legal technique employed here is therefore that of a legal fiction[20] whereby the real use of content in a country of temporary residence is treated as if it had taken place in the country of habitual residence. In this respect it resembles to some extent the technique used earlier in Council Directive 93/83 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission[21]. Article 1(2((b) of the Directive states that 'the act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth' .

However, the main difference between the technique used by the regulation under consideration here and that of Directive 93/83 is that it is much more limited in its scope. Whereas in Directive 93/83 the definition of 'communication to the public by satellite' was accompanied by a harmonisation of the substance of the rights in question which made the application of a single law viable in practice, the proposal for a regulation has no influence either on the substance of copyright or on the number of applicable laws. Furthermore, the regulation seeks to be restrictive in its application. The proposed system merely temporarily extends, for certain individuals only, the geographical coverage of an online content access service. In that way it makes the service 'portable' beyond national borders for the entire time that the person is travelling outside their Member State of residence. However, the proposal neither does away with restricted territorial licences in principle, nor does it extend the facilities granted under it to citizens of the country being visited.

The proposal for a regulation obtains this result by requiring service providers of online content to temporarily open cross-border access to their clients while they are travelling, notwithstanding any contradictory contractual provision resulting from a restricted territorial copyright licence and notwithstanding any decision by such providers to only operate in certain markets.

b) This is not an exception

The proposal does not seek to introduce a new special instance of legal permission to exploit a literary or artistic work. It merely extends, geographically and temporarily, a system of existing contractual authorisations to a limited category of persons.
To that extent it should not be considered an 'exception' to copyright law. If we were to treat the new system as an exception we would probably have to make it subject to a restriction which would not necessarily contribute to the effectiveness of the system in the way sought by the authors of the proposal. Such restriction would derive from the application of the three-stage test imposed by the international conventions (Berne, TRIPS, WCT and WPPT) which, in special cases where exceptions are admissible, prohibits not only any conflict with a normal exploitation of the work but also any unreasonable prejudice to the legitimate interests of the rightholder. This latter condition would thus risk creating an obligation to establish a special financial compensation system for prejudice caused to rightholders' interests[22].

[20] G. Mazziotti - F. Simonelli, 'Regulation on cross-border portability of online content services: Roaming for Netflix or the end of copyright territoriality? ', https://www.ceps.eu/publications/regulation-%E2%80%98cross-border-portability%E2%80%99-online-content-services-roaming-netflix-or-end.
[21] OJ L 248, 6.10.1993.
[22] The traditional interpretation under international law of the third stage of the test could lead to the conclusion that a compensation payment is due. Cf. report of the Panel on Section 110(5) of the US Copyright Act, WT/DS160/R, of 15 June 2000, https://www.wto.org/english/tratop_e/dispu_e/1234da.pdf
See Y. Gaubiac, 'Les exceptions au droit d'auteur : un nouvel avenir, l'OMC statue sur les exceptions au droit d'auteur', *Com. com. électr*. June 2001 ; Y. Gaubiac,'Les exceptions et limitations au droit d'auteur au sens de l'article 13 des ADPIC', *Bulletin du droit d'auteur,* June 2003; Y. Gaubiac, 'Exceptions au droit d'auteur pour

2.4. Gaps in the proposal

Lack of precision concerning the purpose of travel within the Union

It should be specified, if not in Articles 1 or 2, then at least in the first recital of the regulation, that access by consumers to cross-border portability of online content services already legally acquired in the Member State of residence remains confined within the limits of the circumstances referred to by this proposal. Accordingly it is essential to specify the purpose of travel within the Union as 'travel for leisure, business or study'.

a) Lack of restrictions on 'temporary' travel within the Union

Article 3 (1) of the proposal requires providers of online content services that are provided against payment of money to allow a subscriber who is 'temporarily present in a Member State' to access and use the online content. Under Article 2 (d), 'temporarily present' means a presence of a subscriber 'in a Member State other than the Member State of residence'.

By not specifying the permitted duration of the stay in the other Member State, the proposal contains an internal contradiction. On the one hand, according to its explanatory statement, the proposal intends to target 'people who travel within the Union' (point 1. Reasons for and objectives of the proposal). On the other hand, however, by not specifying the maximum duration of the stay abroad or its nature, the proposal is at risk of continuing to be applied to citizens who are not only travelling in another Member State but who stay there for an extended period which exceeds that of a holiday, business trip or study trip. Those staying for an extended period would be perfectly able to obtain access to their desired content from the rightholders in the country where they are staying under similar conditions to those applicable to residents of that country. It should therefore be specified more clearly that the temporary presence in another Member State should be transitory and of a short duration.

This outcome could be achieved in three ways:

- Either by adding to the definition in Article 2 (d) a principle whereby 'temporarily present' means that a subscriber 'is in a Member State other than the Member State of residence for a transitory and short period'. This would have the disadvantage of remaining vague about the precise permitted duration of the stay.
- Or by opening cross-border access for a number of days corresponding to the estimated duration of the holiday, business matters or studies that the subscriber declares in their request. In that case, a maximum period should be imposed.
- Or by setting an abstract maximum number of cross-border access days per year for all subscribers. Subscribers would then have a credit that they could use for any travel within the Union, regardless of its purpose.

b) Insufficient clarity in defining the links that constitute 'residence' for a EU national

Given that the regulation will only apply to subscribers who are temporarily in a Member State other than their Member State of residence, it is important for 'Member State of residence' to be clearly defined. On this point, Article 2 (c) states that this means the Member State where the subscriber is 'habitually' residing.

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faciliter l'accès et l'usage des œuvres', Study Days on Copyright and Freedom of Expression - ALAI, Barcelona 19-20 June 2006.

The genuine and stable nature of this residence of origin needs to be more clearly defined. To that end, it is not sufficient, as is the case in Article 5 (2) of the proposal, to authorise content copyright holders to require service providers to make use of effective yet reasonable means to verify that the service is provided in accordance with their obligation to allow access to a subscriber who is temporarily present in another Member State.

It is not inconceivable that a better definition of 'habitual' residence might be found by taking inspiration from other EU instruments. For example, in a completely different field, a more elaborate definition can be found under Article 7 (1) of Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another[23], which stipulates that:

'For the purposes of this Directive, "normal residence" means the place where a person usually lives, that is for at least 185 days in each calendar year, because of personal and occupational ties or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he is living.

However, the normal residence of a person whose occupational ties are in a different place from his personal ties and who consequently lives in turn in different places situated in two or more Member States shall be regarded as being the place of his personal ties, provided that such person *returns there regularly*. [...]'.

Inspired by this last phrase, one might add to the definition of 'Member State of residence' proposed in Article 2(c) a stipulation that the Member State in which the subscriber has his habitual residence is the Member State to which the subscriber 'regularly returns'.

c) Verification of actual residence

At any event the text should include a direct requirement for service providers to verify their subscribers' Member State of actual residence.

To that end, an annual declaration by the subscriber would be the starting point. The subscriber would not be allowed to declare that he is habitually resident in more than one Member State. The subscriber's declaration would have to contain a reasonable but verifiable combination of indicators of stability of residence, such as ID card, postal address, bank details, IP address, place at which decoder or device for accessing services is located, internet or phone contract or other indisputable evidence. To that end, the regulation could also contain a list of inadmissible indicators. The means of verification should not go beyond what is necessary in order to verify with reasonable certainty the subscriber's Member State of residence. For example, it would not be necessary to permanently monitor the subscriber's geographical position.

The declaration would be made on a voluntary basis. However, if the subscriber failed to send this minimum verifiable information, he would not be entitled to cross-border portability.

d) Other useful information

Recital 7 states that 'the rights in works and other protected subject matter are harmonised, inter alia, in Directives 96/9/EC, 2001/29/EC, 2006/115/EC and 2009/24/EC of the European Parliament and of the Council'. This passage should be expanded. In a

[23] (OJ L 105, p. 59), as amended by Council Directive 2006/98/EC, of 20 November 2006 (OJ L 363, p. 129).

context which deals with the cross-border application of rules on copyright, mention should also be made of Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

It would also be useful to add a new **recital 7a** stressing that the regulation does not affect the application of Directive 2014/26/EU, in particular Title III thereof, which promotes the multi-territorial licensing of the online use of musical works. The regulation and the directive share the objective of facilitating legal access to copyright-protected content.

The reference to the Court of Justice's ruling in joined cases C-403/08 and C-429/08, the Premier League case, is incomplete in that **recital 11** states only that 'certain restrictions to the provision of services cannot be justified in light of the objective of protecting intellectual property rights'. It should be added that this is only the case 'where such restrictions go beyond what is necessary to protect the right in question'. The Court admits derogations only 'to the extent to which they are justified for the purpose of safeguarding the rights which constitute the specific subject-matter of the intellectual property concerned'[24].

The wording of **recital 12** should be tightened up. A sentence should be added stressing that 'The aim of cross-border portability is not general cross-border access, but specific access for subscribers temporarily present in a Member State other than their Member State of habitual residence to which they regularly return'.

Recital 24 notes that the regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. In this connection it cites 'the right to respect for private and family life, the right to protection of personal data, the freedom of expression and the freedom to conduct a business'. In the context of the subject-matter we are dealing with here, it seems necessary and justified to add to this list of examples the fundamental right to property, including intellectual property.

With a view to preventing any evasion of the application of the regulation, **Article 5** on contractual provisions should also include a prohibition on choosing the law of a country that is not an EU Member State.

[24] Paragraphs 93-94 and 105-106 of the judgment.

3. CONCLUSION AND THOUGHTS FOR THE FUTURE

Should the proposal for a regulation be seen as a first step towards completely doing away with copyright territoriality within the Union? Or should it instead be analysed as an element of flexibility which confirms the principle of territoriality itself?

The proposal itself declines to take a position in that discussion. It limits itself to stating that existing licensing agreements are upheld in principle. Under recital 26, the proposal 'should also prevent copyright owners from having to renegotiate existing licensing agreements with a view to allowing providers to offer cross-border portability of their services'. According to recital 29, 'therefore... this Regulation does not substantially affect the way the rights are licensed and does not oblige right holders and service providers to renegotiate contracts'. Analysing the impact of its proposal in the explanatory statement, the Commission also states that 'the cross-border portability of online content does not enlarge the spectrum of the service's users and does not call into question the territorial exclusivity of licences'.In any case, we note that the territorial division of exploitation licences for performance and distribution rights may prove to be justified or even necessary in certain sectors, for example the film industry, for financial as well as cultural reasons.

This is at any rate the position of Parliament, which, in its **resolution of 19 January 2016 'Towards a digital single market act'**, while welcoming 'the Commission proposal to encourage portability and interoperability in order to promote the free movement of content or service purchased and made available legally, as a first step towards doing away with unjustified geo-blocking, as well as the cross-border accessibility and functionality of subscriptions' also highlights 'that there is no contradiction between the territoriality principle and the measures aiming to remove obstacles to the portability of content' (paragraph 37).

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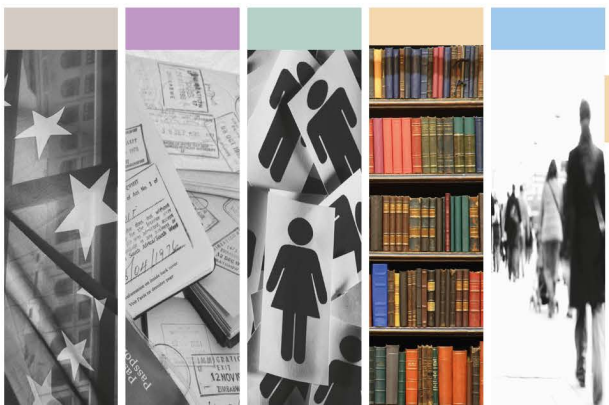

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