

EC Proposal for a Regulation on cross-border portability of online content services in the internal market

SAA comments – March 2016

The European Commission presented on 9 December 2015 a proposal for a Regulation on ensuring the cross-border portability of online content services in the internal market as the first instrument of its plan¹ to develop cross-border access to content. SAA [welcomed](#) the fact that the Commission does not directly question the territoriality principle and recognises the ability of copyright and authors' rights to adapt to any market structure and business model, whether territorial or pan-European. However, some measures could still inadvertently challenge the territoriality principle and need to be reconsidered - "While we can support portability of subscription-based online content services, poor drafting that would not limit the portability in time could allow cross-border access through the back door". Territorial licensing of rights is key in the financing, production and distribution of European audiovisual works. Far from being technical, the Commission's initiative on cross-border portability could therefore have unintended negative consequences on the economy of European creation if it does not take into account the foundations of such a system, which relies on strong sectorial regulations and on the acquisition of territorial exclusivities.

In addition, SAA expressed concern that cross-border access still seems to be mistaken for the silver bullet to enhance accessibility to and visibility of European works, while only active promotion which brings European works to European citizens' direct environment makes a difference in a highly competitive market dominated by Hollywood productions.

It is therefore important that the proposal for a Regulation on cross-border portability of online services does not inadvertently question the territoriality principle by imposing pan-European licences by default. The main risk lies in a lack of precise definitions and concepts in the current proposed Regulation. These need to be better framed to provide all parties with adequate legal certainty and prevent potential abuses or circumvention of the rules.

Above all, building a digital single market has to go hand in hand with other objectives of general interest such as the protection and promotion of cultural and linguistic diversity, the support of European creators and the development of European operators.

In this paper, SAA addresses the main aspects of the proposal which need to be refined, starting with the choice of a Regulation as an instrument to intervene in the field of copyright.

Is a regulation an appropriate instrument to deal with copyright issues?

This is the first time the Commission has proposed a regulation in the copyright field. The legislative instrument used so far has been the directive, with 11 of them dealing with copyright and related rights. Directives aim at harmonising national legislations on certain aspects, defining general principles and directions and leaving room for implementation at national level by Member States (both on the implementation instrument and the wording).

A regulation is a very different instrument. It is directly applicable in all Member States simultaneously, leaving no room for interpretation or implementation by Member States and

¹ Communication of the Commission « Towards a modern, more European copyright framework of 9 December 2015 COM(2015) 626 final.

stakeholders. This type of instrument is justified to address a specific issue and rapidly achieve direct, uniform application of the rules.

The difficulty with the current proposal for a Regulation on cross-border portability is that the proposed rules are unclear and left to different possible interpretations by online content service providers on many aspects. This could lead to very different terms and conditions across online services and inequality of treatment of rightholders and consumers, contradicting the purpose of a Regulation. The core concepts and definitions must be clarified for the proposal to be a success.

Organising cross-border portability, not enabling cross-border access

Article 1 defines the objective and the scope of the Regulation and Article 4 the main tool to ensure its conformity with copyright and related rights.

Article 1 should include two extra elements (underlined) to ensure that it does not go beyond cross-border portability and that it is copyright compliant. Article 1 should become:

“This Regulation introduces a common approach to ensuring that subscribers to online content services in the Union, when temporarily present in a Member State other than their Member State of residence, can access and use these services while respecting the relevant copyright and related rights of the content accessed and used.”

These are essential elements of the Regulation whose purpose is to organise portable services' respect for copyright and related rights.

The legal tool proposed by the Commission to avoid pan-European licences but ensure the conformity of cross-border portable online services with copyright and related rights is a legal fiction which deems the provision, access and use of the service as occurring solely in the Member State of residence of the subscriber (Article 4). This legal fiction is acceptable as long as it is limited to cross-border portability and does not expand to cross-border access. This difference is essential and should be reiterated in a recital.

The online content services covered by the Regulation

The Regulation applies to lawfully provided online services in the Member State of residence on a “portable” basis, to subscribers, either “against payment of money” or “without payment of money provided that the subscriber’s Member State of residence is verified by the provider” (Article 2e and f).

SAA wants to clarify the need for all services providing cross-border portability to conduct residency checks. If this verification did not apply, it would allow foreign consumers to subscribe to services in another EU Member State and access them from their country of residence thanks to the cross-border portability. This would be a circumvention of the Regulation and amount to cross-border access. It is therefore essential that the definition of online content services (Article 2e) clarifies that paid-services verify that their subscribers reside in the country where the service is provided.

In addition, due to uncertainty in the capacity of free-services to implement serious and efficient authentication measures, SAA recommends that the Regulation concentrates on paid-services and excludes free-services. Paid-services are the most attractive to consumers as they offer the most interesting catalogues and are the most likely to take a commercial advantage of cross-border portability.

Finally, the definition of a “portable” service is unclear (Article 2f): it currently means that subscribers can effectively access and use the online content service in the Member State of residence “without being limited to a specific location”. It would be simpler to say that it is accessible on a portable device such as a computer, tablet or mobile phone.

Defining the notion of temporary

The current definition of “temporarily present” in Article 2(d) only requires the presence of a subscriber in a Member State other than the Member State of residence. This allows such a temporary presence to extend until you become permanently present in another Member State and inform the service of this change, i.e. you change your Member State of residence. It is important that, at a minimum, the notion of a limited period of time is included to avoid abuses, by indicating for instance a maximum length of stay, both continuously and by year. Such details, on the specific number of days or months, should be further discussed with stakeholders. In any case, SAA believes that a Regulation needs to be specific to succeed due to its directly applicable nature and target of offering equal treatment to EU consumers.

Better defining the notion of residence

The notion of residence is central to this Regulation proposal. The proposal aims at allowing residents of a Member State to travel to another Member State and continue to access and use their subscription-based online content services while away. The legal fiction mechanism used to make this copyright-compliant pretends the access and use of the service occurs solely in the Member State of residence. The notion of Member State of residence is therefore pivotal to the whole construction.

However, the definition in Article 2c simply refers to the Member State “where the subscriber is habitually residing”, opening up the possibility for each and every service to set up its own criteria to define a “habitual residence”, with the possibility for loose requirements that would open the door to cross-border access. In the same way that a strict definition is necessary for “temporary”, clear criteria to establish the Member State of residence are essential to prevent abuses and cross-border access through the back door.

The obligation to enable cross-border portability should include the obligation to verify the Member States of residence and temporary presence

Article 3 provides for the obligation of online content service providers to enable cross-border portability of their service. It should be supplemented by two aspects:

Firstly, paragraph 1 should specify that the provider of an online content service shall enable a subscriber who is temporarily present in a Member State “other than his Member State of residence” to access and use the service.

Secondly, this provision does not currently contain any obligation to verify the Member State of residence of the subscribers and their temporary presence in another Member State when they access the service. Yet this verification/authentication is the basic element establishing any use of the cross-border portability feature as mentioned in both the explanatory statement and recitals. Article 5 on contractual provisions only enables rightholders to require service providers use effective means to verify that the service conforms with Article 3(1), as long as the required means are reasonable and do not go beyond what is necessary to achieve their purpose. This is insufficient to ensure the proper functioning of the system of cross-border portability and incomprehensibly places the burden of the negotiation and verification of the use of effective means on rightholders. This raises many questions, such as: who are the rightholders who will be in a position to impose the use of effective means on service providers? What would happen if they could not agree on the authentication measures? Would portability have to be provided anyway? What would be the remedies if rightholders consider authentication measures to be insufficient?

It is essential that this obligation to authenticate/verify instances of cross-border portability is imposed on service providers and does not depend on negotiations at the initiative of rightholders. An obligation to verify the Member State of residence when a subscriber is accessing the service should therefore be added in Article 3 in a new paragraph 4: “the provider shall make use of effective means in order to verify the Member States of residence of a subscriber and its temporary presence in another Member State when accessing the service”.

Recital 17 gives examples of “reasonable indicators” to help service providers verify the Member State of residence of its subscribers. It mentions information such as a payment of a licence fee for other services provided in the Member State of residence, the existence of a contract for internet or telephone connection, IP address or other means of authentication. This list seems non-exhaustive and could probably include other indicators such as banking details. It therefore implies that each service provider could use different indicators. This raises three questions:

- Are these indicators strong enough to verify the Member State of residence?
- Should it be left to service providers to select their own verification method?
- Does possible application of different means of verification ensure equality of treatment of consumers?

All these questions need an answer for the Regulation to reach its objective without disrupting existing and future business models for the financing, production and exploitation of European works. It is essential that the Council and European Parliament, in concertation with rightholders and service providers, improve the proposal with the aim to ensure legal certainty and equal treatment of consumers, rightholders and service providers in cross-border portability situations.