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Recent developments on the EU Proposal for a Regulation on cross-border portability

Gianluca Campus (University of Milan) · Monday, December 19th, 2016

Recent developments on portability



On November 28th 2016 the Working Group on Intellectual Property Rights and Copyright Reform established by the Committee on Legal Affairs of the European Parliament issued a [Report](#) with possible amendments to the European Commission's draft [Proposal for a Regulation on ensuring the cross-border portability of online content services in the internal market](#) (the "Draft Regulation on portability" or just "Draft Regulation").

This is the latest in a series of interventions on the Draft Regulation by EU bodies in recent months.

On 18th May the Council clarified its [General Approach on portability](#), which is basically the result of a mediation at Council level between a large number of national delegations, and which focuses on two outstanding issues: (i) temporary presence; and (ii) flexibility regarding verification.

On 27th April, the European Economic and Social Committee adopted an [Opinion](#) at the request of both the Council and the European Parliament. The Opinion includes some conclusions and recommendations but does not introduce explicit amendments to the Draft Regulation.

In the next few months, the Council and the European Parliament will discuss the possible amendments to the EU Commission's draft Proposal, and approval of the

Regulation is expected by March 2017.

The EU Commission's Proposal for a Regulation on cross-border portability

The Draft Regulation on portability is one of the first Commission initiatives under the Digital Single Market Strategy. In May 2015, the European Commission published a [Communication on the Digital Single Market Strategy](#) (the “DSM Strategy” or simply the “Strategy”), thereby fulfilling the second priority of Jean-Claude Juncker’s [Political Guidelines for the next Commission](#) of July 2014[1]. Among the aspects addressed in the Strategy we find the prevention of unjustified geo-blocking practices (§ 2.3) and better access to digital contents (§ 2.4).

A common practice in the sector of online content distribution is the prevention of access to on-line audiovisual services from abroad by means of identification of the IP address requesting access to the audiovisual services, thereby preventing access for both consumers requesting access from another Member State and consumers normally resident in the Member State where the audiovisual services are distributed, but occasionally resident in another Member State.

Basically, the European Commission has identified at least three problems with the Strategy:

- use of electronic means for preventing access to online digital contents from another Member State;
- barriers to cross-border distribution of digital copyright works; and
- barriers to portability of audiovisual services.

Problems (1) and (2) identify general areas of intervention for the European legislature according to the Strategy (electronic technical measures and territoriality of copyright). Problem (3) seems to be a very specific area of intervention where a subset of both problems (1) and (2) are involved.

The Draft Regulation on portability addresses problem (3).

On the basis of the EU Commission’s proposal, the portability of online services will be structured as follows:

- (i) portability is granted to natural persons who subscribed (also indirectly) or have free access (but with identification of the Member State of residence) to audiovisual media services (see Article 2) in the territory of a Member State via portable devices (see Article 3);
- (ii) portable services are online audiovisual media services (linear and non-linear), whether paid or free (see Article 2), and online services which allow access (via streaming, downloading or other techniques) to works, with the exclusion of those services that use works in an ancillary manner;
- (iii) portable devices are those devices that can be used to access portable services without being limited to a specific location (especially tablets and smartphones);

(iv) the right of portability is the right for users to access portable services to which they subscribed in one Member State when they are temporarily resident in another Member State; and

(v) under a legal fiction, the reception of the portable services in another Member State of temporary residence is deemed to have occurred in the Member State in which the user is authorised to receive the services and any conflicting contractual provisions from the right-holders and/or the service providers are null and void.

The Opinion of the European Economic and Social Committee

As stated above, the European Economic and Social Committee did not expressly propose amendments to the Draft Regulation but made some general remarks:

(I) the definition of “Member State of residence” needs to be supported by a non-exhaustive list of indicators to establish the time-related link based on residence;

(II) a minimum quality of access to portable online content services should be ensured (on the benchmark standard for local lines), without creating disproportionate costs for service providers;

(III) online content service providers could offer premium services that do guarantee standard quality for access to portable services against payment of a surcharge, but unfair practices by providers should be discouraged;

(IV) a new definition of “*partially portable*” service should be introduced for quality-sensitive online services in cases where the low quality of local Internet makes an online content service unusable for subscribers in particular areas; and

(V) the principles of proportionality and of technological neutrality should be guaranteed, as well as all other rights and principles enshrined in the Charter of Fundamental Rights of the European Union.

The Council’s General Approach

The Council’s General Approach on portability has addressed some restrictions in scope of the Draft Regulation and has suggested possible amendments/integrations aimed essentially at clarifying that:

(i) the territorial licencing system remains vital and portability is allowed under a legal fiction strictly interpretable and applicable to legally acquired contents only;

(ii) the portability should apply only to online content services accessible in the Member State of residence without being limited to a specific location (if the service is not portable at national level, it won’t be portable across borders);

(iii) the portability should be an optional regime for online content services which are provided without the payment of money and do not have a verification system;

(iv) the portability should also be an optional regime for providers already offering subscribers, temporarily present in another Member State, online content in that Member State with the authorisation of right-holders;

(v) the “Member State of residence” of the subscriber is identified by the online content service providers on the basis of a number of verification means (ID card, billing address, bank details, etc.), to be used in combination;

(vi) a subscriber can be considered “Temporarily present” in another Member State only for limited periods of time or for transitory presence; and

(vii) right-holders may withhold the rights licensed to an online content service provider if the provider cannot demonstrate that it is carrying out proper residency verifications (save where right-holders intend to opt out of verifications).

The Report of the Committee on Legal Affairs of the European Parliament

The Committee on Legal Affairs of the European Parliament in its recent Report has accepted a number of amendments proposed by the Council but, in some aspects, seems to stick more to the Commission’s proposal. Looking in more detail, the provisions of the Report are as follows:

(a) the respect for the territorial licencing system and the strict interpretation of the legal fiction are confirmed, but it clarifies that the right to portability includes the right for subscribers not to be additionally charged;

(b) the right to portability is subject to prior verification by the online content service providers of the State of residence by at least two verification means combined (in the absence of verification, via random check of IP address instead, or in the case of lack of collaboration by the subscribers, the provider is entitled not to offer portability to non-collaborating subscribers);

(c) the right to portability is limited to the same range and number of devices offered in the Member State of residence of the subscriber;

(d) the definitions of “Member State of residence” and “Temporarily present” are based on the dichotomy introduced by the Commission of habitual residence/non-permanent presence (this means rejection of all other proposed qualifications of “stable residence”, “regularity of return”, “residence of limited periods of time”);

(e) an optional regime for portability is confirmed both for online content service providers already authorised to offer access to their subscribers abroad and online content services which are provided without the payment of money and do not have a verification system;

(f) minimum quality of access to portable online content services must be ensured, but possible exceptions due to the inadequacy of national infrastructure are allowed, subject to prior information, where available, to the subscribers; and

(g) the Regulation on portability shall enter into force after twelve months after publication and will be reviewed by the Commission every three years, taking into account variation in the revenues of right holders and increases in prices charged to consumers. The online content service providers are in any event also authorised to offer portability before the effective date of entry into force of the Regulation.

Cross-border portability: possible impact on territoriality and contractual autonomy

Even following potential changes during the legislative process, and despite formal acknowledgment being given to the principle of territoriality of copyright, the Draft Regulation on portability seems to be still characterised by a relevant systematic impact.

The Draft Regulation represents a new legislative approach based on the reduction of autonomy for economic operators in using licensing models and technical protection measures for shaping the Digital Single Market. Economic operators and other institutional stakeholders (such as collecting societies) are used to regulate the market for digital goods and services by contract and by technical means (which allows the geo-location of users). With the Digital Single Market Strategy (and the Draft Regulation is a clear sign of this approach), the Commission is trying to define a new vision of a pan-European market for digital goods and services, even if this requires some limitations to the autonomy of economic operators.

The portability is basically a business model for economic operators (even of interest for those operators that intend to pay attention to their clients with international mobility) but in the Draft Regulation is presented as a sort of new consumer right. This could result in the imposition of a peculiar business model for operators (who would also have to pay the costs) and could lead to a general increase in costs passed on to clients (even if only a minority of clients are interested in international mobility).

The real point at stake to allow cross-border circulation of digital contents and services is introducing more flexibility in the acquisition of rights, which could lead to higher and better offers of cross-border services considered profitable by economic operators.

It is worth noting that in its recent [Proposal for a Regulation on certain online transmissions of broadcasting organisations](#), the Commission proposed the introduction of the principle of the country of origin for some ancillary broadcasting services such as simulcasting and catch-up (this is another exception, after the legal fiction for portability, to the principle of territoriality) but has not imposed any specific business model, limiting instead the legislative intervention to a more flexible system of negotiation of the right of retransmission.

The legislative process is paying attention to the points highlighted above, as demonstrated by the following amendments: (i) the limitation in scope of the Draft Regulation on portability (portability is turned into an optional regime for free-services without verification and for pay-services that have the rights to offer access in

other Member State without applying portability); and (ii) the introduction of a mechanism of periodic review of the Regulation, in order to take into account possible increases in prices charged to consumers.

[1] In President Juncker's view the European Union should make better use of the "great opportunities offered by digital technologies, which know no borders" and should "have the courage to break down national silos in telecoms regulation, in copyright and data protection legislation, in the management of radio waves and in the application of competition law."

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