

Kluwer Copyright Blog

The Portability Regulation (Regulation (EU) 2017/1128): An introduction

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Since 1 April 2018, the [Portability Regulation](#) has prohibited geo-blocking of online content within the European Union under certain requirements. The regulation guarantees the unrestricted access to (paid) subscribed online content of all European citizens, regardless of where they are present in EU



territory. The presence must be “temporary”. Providers of fee-based online content are then obliged to guarantee their subscribers cross-border portability. A limitation of the access or the demand of additional fees is prohibited. The Portability Regulation does not apply directly to offers that are not or not directly liable to payment, such as media libraries. It is rather voluntary for these providers. Furthermore, the Portability Regulation also includes rules to minimize the user’s personal data collected in order to identify the Member State.

Meaning and purpose

The Portability Regulation is part of the Initiative of the European Commission towards a Digital Single Market, which has its origin in the Commission’s communication on the Digital Single Market Strategy for Europe (COM(2015) 192 final), which was published in May 2015. The objective stated in the communication was the achievement of a Union-wide connected Digital Single Market based on three pillars: (1) better access to online goods and services, (2) optimum conditions for digital networks and services and (3) the digital economy as a growth engine. As a Digital Single Market, the Commission envisions a digital European single market, in which private citizens and businesses are able seamlessly to access and pursue online activities and use

web applications, under conditions of fair competition and with a high level of consumer and personal data protection, irrespective of their nationality, residence or place of business. The Portability Regulation therefore only governs a small part of the first pillar. It only legislates for the portability of online content outside the Member State of residence for subscribers to a service who are temporarily present in another Member State (Art. 1 (1) Portability Regulation). As such, the Portability Regulation uses a legal fiction that such a temporary presence is deemed to be a presence in the Member State of residence, see Art. 4 Portability Regulation. Therefore, it is not about consumers' general cross-border access across the EU to online content services in Member States other than their Member State of residence. The Regulation, which implemented the Portability Regulation as one of the first projects of the "digital agenda", thus separates the question of the portability of content services in cases of temporary presence in another Member State from the far more complex and economically more serious question of cross-border access to online content services.

Prior to the Portability Regulation, there were various barriers to the provision of access to content to consumers temporarily present in a Member State, in particular due to the fact that licences to use content protected by copyright or related rights are often granted on a territorial basis (as in the case, for example, of films) and that providers of online content services can decide only to service certain markets (see Recital 4 Portability Regulation). The possibility under copyright law to grant rights for individual States separately is also not excluded by antitrust law (Art. 101 TFEU). There is no general country of origin principle under EU anti-trust law governing online uses in EU copyright law. The exceptions also confirm this, namely the restricted country of origin principle in Art. 4 Portability Regulation and the country of origin principle for satellite broadcasting as per Art. 1 (2) (b) Satellite and Cable Directive. The Portability Regulation is aimed at bringing about a balancing of the different interests: on the one hand, the **user** of digital and copyright protected content is increasingly mobile and expects online access to the works throughout the European Union. It would reach the limits of user acceptance if a consumer, who is temporarily present in another country, were not able to access something they have acquired and paid for. The privilege is only afforded to users domiciled within the European Union, however; people who have their permanent residence in a country outside the European Union do not come under the Portability Regulation (c.f. below). On the other hand, the interests of the rightholders in maintaining their exclusive rights position must be preserved. The provisions of the Regulation are not intended to reduce the high level of protection enjoyed by authors (Recital 12 Portability Regulation). One of the interests of authors and other rightholders is in particular the ability to define their own optimum exploitation strategy themselves, through a territorial splitting of rights. For example, a differentiation in price and conditions by territory enables film rightholders to secure a sufficient return on investment in the high risk business of film production, thereby ensuring diversity in European film is protected. Furthermore, the interests of the providers of online services must be taken into account.

History of the Regulation

On 9 December 2015, the Commission published a proposal for a Regulation to ensure cross-border portability of online content services in the internal market (COM(2015) 627 final), that is to say the first draft of the Portability Regulation. This draft version was based on the results of a consultation carried out in 2013 and 2014 on the review of the EU copyright rules. The proposed Regulation was adopted by the European Parliament on 18 May 2017 with a series of amendments and published on 30 June 2017. The Regulation has therefore been in force since 20 July 2017 (Art. 11 (1) Portability Regulation). However, the Portability Regulation only applies in the

Member States from 1 April 2018 (Art. 11 (2) Portability Regulation).

The Portability Regulation is the first EU regulation in the area of copyright law. Elsewhere, the EU had pursued the harmonisation of copyright law through directives, which then had to be transposed into the national copyright laws. EU regulations differ from directives in that regulations are directly applicable in every Member State (Art. 288 (2) TFEU). The Portability Regulation has thus become the first part of a European copyright system directly applicable in all Member States. It remains to be seen whether this trend will continue. The reasoning behind the decision to employ the legislative instrument of a regulation, as stated in Recital 35, namely that it was “necessary in order to guarantee a uniform application of the cross-border portability rules across Member States and their entry into force at the same time with regard to all online content services, can also be applied to other copyright questions which have to date only been harmonised by way of directives.

Brief summary of the provisions of the Portability Regulation

Art. 1 Portability Regulation determines the subject matter and scope of application of the Portability Regulation. This wording of the subject matter of the provision has no independent regulatory content as far as the definition of terms in Art. 2 and the substantive provisions in Art. 3 to 9 Portability Regulation are concerned. The material core of the Portability Regulation is contained in Arts 3 and 4. Firstly, Art. 3 provides for an obligation to enable cross-border portability of online content services. Art. 4 defines the place of residence as the place of provision of online content services as well the access to and use of these services, if the user is only temporarily present in another Member State. Under Art. 5 Portability Regulation, the provider of the online service is entitled to verify this Member State of residence. Art. 6 contains a special rule for the cross-border portability of online content services provided free of charge, while Art. 7 then regulates the contractual provisions between providers of online content services and rightholders on the one hand, and between providers of online services and their users on the other; the article also contains provisions regarding international private law. The protection of personal data is the subject of Art. 8 Portability Regulation. Transitional provisions governing existing contracts and acquired rights are set out in Art. 9, while Art. 10 provides for a review of the Portability Regulation by the Commission by 21 March 2021. The final provisions, in particular regarding the entering into force of the Regulation, are found in Art. 11.

Full commentary on the articles of the EU Portability Regulation

This Kluwer copyright blog contribution cannot include a full commentary on all the material provisions of the EU Portability Regulation. You can find an open access article with the full commentary on the scope and application of the EU Portability Regulation authored by us in Jipitec – Journal of Intellectual Property, Information Technology in e-commerce law. The commentary can be freely accessed via the following link: <https://www.jipitec.eu/issues/jipitec-9-2-2018/4728>.

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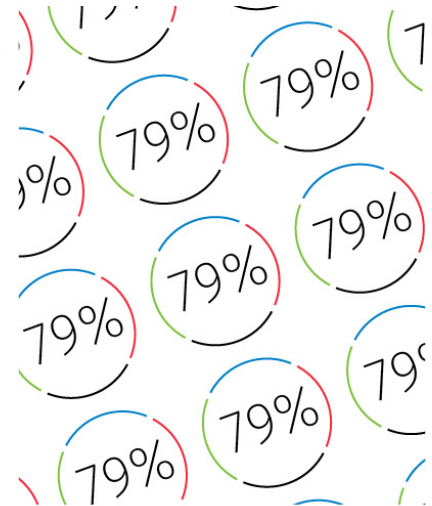
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