

# **The EU Portability Regulation: One Small Step for Cross-Border Access, One Giant Leap for Commission Copyright Policy?**

## **Abstract**

*This article seeks to demonstrate that the newly proposed Portability Regulation, intended to permit access to online works legally available in one Member State when the user travels to another Member State, represents a cautious first step towards significant copyright reform in the EU. While there are some ambiguities in the proposal that require scrutiny, the Commission has nevertheless made its first concrete step towards addressing issues of territoriality in copyright law.*

## **Introduction**

How many readers of this journal have found that when travelling for business, they are not able to watch the latest episode of their favourite TV show normally available through services like the BBC iPlayer or other online ‘TV catch-up’ services provided by their national television networks? How many have travelled overseas for a family holiday, enjoying the sun but nevertheless feeling a pang of regret over missing a local, regional or national sporting event? For many Internet users, who have found themselves increasingly mobile across borders, who increasingly possess mobile devices with wireless and cellular access to the Internet, the fact that services that they have legally subscribed to are not accessible when they step foot outside their national borders is a somewhat incomprehensible one. The nature of copyright as a territorial right, even within the EU, subject to national licensing requirements and national exploitation makes cross-border access to content difficult, even where the range and availability of inexpensive, legal means of accessing such content has proliferated over the past decade. That content produced and licensed in Italy cannot be accessed by an individual in the UK, despite being willing to pay for access to such content already creates a significant hindrance upon the realisation of a single market for digital media in the EU; that the same individual could happen to travel to Italy, only to find that access to content legally paid for in the UK is no longer available not only constitutes a hindrance but, to quote the late Sir Terry Pratchett,

an ‘embuggerance’. However, recent moves by the European Commission appear to indicate that the European institution is well aware of the discontent that these digital borders are creating for European consumers. Presenting a proposal for a Regulation in December 2015, the Commission has announced that as a small part of a larger modernisation of the copyright framework, users legally subscribing to an online content service in one Member State should be able to retain access to that service when temporarily present in another Member State. While this does little in itself to tackle the issue of territoriality of copyright and the subsequent hindrances to the development of a single market for digital media, it nevertheless constitutes a heartening first step. This article will begin by providing context to the Regulation, discussing the problem of territoriality of copyright and the limited success the Commission has had in addressing this issue, particularly through non-legislative means. The second section of the paper will discuss the Regulation in more detail, demonstrating the intent and changes that it will introduce, while highlighting some of the ambiguities existing in the proposal. In the third section of this article, the implications of the changes will be explored, demonstrating that while the Regulation would constitute a good first step in tackling the problem of cross-border access, it should nevertheless be considered as a first step only, with current developments concerning cross-border access to digital works suggesting that a more ambitious legislative initiative should be pursued.

### **The Problem of Digital Copyright and the Digital Single Market Strategy**

It would be safe to conclude at this time that the regulation of copyright in the online environment has proven to be controversial and a difficult field in which to develop law or policy. Since the passing of the controversial Information Society Directive<sup>1</sup> in the early 2000s<sup>2</sup>, concerns have been raised concerning the lobbying power of the creative industries with regard to setting the legislative agenda at the EU level, based on information asymmetries between European institutions lacking specific knowledge and information that can be used as the basis for evidence-based policy-making, and the

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<sup>1</sup> Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society

<sup>2</sup> See for example P Bernt Hugenholtz, ‘Why the Copyright Directive Is Unimportant, and Possibly Invalid.’ (2000) 11 European Intellectual Property Review 499; Martin Kretschmer, ‘Digital Copyright: The End of an Era’ (2003) 25(8) European Intellectual Property Review 333.

creative sectors as perceived experts possessing that required information<sup>3</sup>. While this has led to a gradual (and sometimes rapid) expansion of the scope of copyright, particularly in the digital environment<sup>4</sup>, and indeed the duration of the protection of copyrighted works such as sound recordings<sup>5</sup>, this often piecemeal harmonisation of aspects of copyright has done little to resolve fundamental issues regarding cross-border access to digital works. As it stands, there is no 'European' copyright, or unified copyright title as exists in the fields of trademark<sup>6</sup>, or more controversially, patent<sup>7</sup>. Despite initiatives such as the Wittem Group proposals for a European copyright code<sup>8</sup>, copyright is still a national, territorially delimited rights, albeit one that has been harmonised to an extent, although not always effectively, such as with regard to the exceptions and limitations<sup>9</sup>. That this is the case has been noted and upheld by the *Lagardère* decision, which reiterated the territorial nature of copyright, even within the EU<sup>10</sup>. As has been noted, territoriality has remained the Achilles heel of the EU's initiatives in the field of copyright law<sup>11</sup>, with implications for the creation of a true single market for copyright protected works. It is readily apparent that the territoriality of copyright leads to the inability of EU citizens to access legally available services for digital media content in other Member States than their own<sup>12</sup>, on the grounds that the licenses afforded to service providers are often, by their nature, territorially restricted<sup>13</sup>. The Commission appears equally aware of this, expressing on several occasions the desire to remove these barriers to the creation of a 'digital' single market.

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<sup>3</sup> Benjamin Farrand, 'Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement' (2015) 35 Oxford Journal of Legal Studies 487.

<sup>4</sup> As detailed in Giuseppe Mazziotti, *EU Digital Copyright Law and the End-User* (Springer 2008).

<sup>5</sup> Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection for copyright and certain related rights increased the term of protection for sound recordings from 50 years to 70 years.

<sup>6</sup> Regulation No 207/2009 on the Community trade mark (consolidated version)

<sup>7</sup> Regulation No 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection and Regulation No 1260/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements

<sup>8</sup> The Wittem Group, 'European Copyright Code' (2011) 33(2) European Intellectual Property Review 76.

<sup>9</sup> Guido Westkamp, 'The Implementation of Directive 2001/29/EC in the Member States, Part II' (Queen Mary Intellectual Property Research Institute 2007); Lucie Guibault, 'Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC' (2010) 1 Journal of Intellectual Property, Information Technology and E-Commerce Law 55.

<sup>10</sup> Case C-192/04 *Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)* EU:C:2005:475

<sup>11</sup> Mireille van Eechoud and others, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Wolters Kluwer Law & Business 2009) 308.

<sup>12</sup> See in particular Benjamin Farrand, *Networks of Power in Digital Copyright Law and Policy: Political Salience, Expertise and the Legislative Process* (Routledge 2014) chapter 3.

<sup>13</sup> Ingo Brinker and Tobias Holzmüller, 'Competition Law and Copyright - Observations from the World of Collecting Societies' (2010) 32(11) European Intellectual Property Review 553, 553.

Initiatives based on this desire, however, have had limited effect. One of the first moves by the Commission in this field in recent history was Creative Content Online<sup>14</sup>, a tentative proposal to facilitate cross-border licensing of digital works so as to remove digital barriers in the internal market. In 2009, a Reflection Paper was published by the Commission, with a list of potential non-legislative measures including improving transparency and accountability in licensing agreements, increased collaboration with service providers and financial incentives<sup>15</sup>, but little in the way of directly tackling the issue of territoriality in copyright. Ultimately, however, Creative Content Online as an initiative was suspended, due to an inability to reach a compromise with right-holders<sup>16</sup>. A similar non-legislative approach was announced in 2012 under the name 'Licenses for Europe', focused on industry initiatives to facilitate cross-border access to digital media<sup>17</sup>. This initiative resulted in a 2013 commitment by representatives of the copyright-protected content producers that they would facilitate cross-border portability of content and easier licensing for music<sup>18</sup>. However, by 2015 the Commission had acknowledged that this non-legislative measure had been something of a failure, with no evidence of "any tangible results or concrete industry follow-up"<sup>19</sup>. The softly-softly approach to facilitating cross-border access in the EU did not therefore appear to be working – indeed, the increasing evidence that stakeholders including content producers had significant vested interests in retaining territorial restrictions upon the access to works required that the Commission pursue 'harder' regulatory mechanisms as a way of changing the status-quo.

A new wave of seemingly ambitious copyright initiatives appear to have been kick-started with the commencement of the Juncker Commission in November 2014, and indirectly by the European Parliamentary elections in May, a few months before the Juncker Commission began work. In addition to some significant restructuring of the Commission structures

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<sup>14</sup> European Commission, 'Creative Content in a European Digital Single Market' COM(2007) 836.

<sup>15</sup> European Commission, 'Creative Content in a European Digital Single Market: Challenges for the Future' (European Commission 2009) A reflection document of DG INFSO and DG MARKT.

<sup>16</sup> Euractiv, 'Commission Shelves Plans to Curb Online Piracy' (*Euractiv*, 16 February 2009) <<http://www.euractiv.com/infosociety/commission-shelves-plans-curb-on-news-221283>> accessed 26 July 2013.

<sup>17</sup> European Commission, 'Creative Content in a European Digital Single Market' (n 14) 3.

<sup>18</sup> European Commission, 'Licenses for Europe: Ten Pledges to Bring More Content Online' (2013).

<sup>19</sup> European Commission, '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' (2015) SWD(2015) 270 18.

and hierarchies<sup>20</sup>, President of the Commission Juncker set out his strategic priorities, which included a “connected digital single market and a proposal on copyright reform”<sup>21</sup>, to be facilitated by the newly appointed Vice-President for the Digital Single Market, Commissioner Ansip, who was tasked by Juncker to “break down the national silos in [...] copyright [and modernise] copyright rules in light of the ongoing digital revolution”<sup>22</sup>. Given previous attempts to reform copyright law in the EU were not particularly successful, and that previous initiatives were marked by a certain level of indecision and resistance from stakeholders, one may be forgiven for believing that this apparent strategic priority would fail to develop into a comprehensive package for reform. However, two events in 2015 served to alleviate somewhat such concerns. The first was the publication of the Digital Single Market Strategy Communication in May 2015<sup>23</sup>. The Communication starts promisingly, by reiterating the text of Juncker’s letter to Vice President Ansip, and stating that in order to ensure better access for consumers and businesses to online goods and services, the Commission needs to ensure the “removal of key differences between the online and offline worlds to break down barriers to cross-border online activity”<sup>24</sup>. The Commission also states that it intends to end “unjustified geo-blocking”<sup>25</sup>, also known as territorial restrictions on access to content to individuals within a particular Member State, including for example, differential pricing on care hire depending on which Member State the consumer accesses the service from. The Commission would bring a legislative proposal to end such practices in early 2016<sup>26</sup>; with regard to copyright specifically, however, the Commission reiterated that “barriers to cross-border access to copyright-protected content services and their portability are still common, particularly for audiovisual programmes”, including those services and that content already legally

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<sup>20</sup> Maria Jepsen, ‘New European Commission, New Start?’ (2015) 21 *Transfer: European Review of Labour and Research* 243; Hussein Kassim, ‘Revisiting the “Management Deficit”: Can the Commission (Still Not) Manage Europe?’, *Multi-Level Governance: The Missing Linkages*, vol 4 (Emerald Group Publishing Limited 2015).

<sup>21</sup> Jean-Claude Juncker and Frans Timmermans, ‘Letter to President Schulz and President Renzi’ (12 November 2014) 2 <[http://www.euractiv.com/files/letter\\_by\\_juncker\\_to\\_parliament\\_and\\_council.pdf](http://www.euractiv.com/files/letter_by_juncker_to_parliament_and_council.pdf)> accessed 19 January 2016.

<sup>22</sup> Jean-Claude Juncker, ‘Mission Letter to Andrus Ansip, Vice-President for the Digital Single Market’ (12 November 2014) 4 <[http://ec.europa.eu/archives/juncker-commission/docs/ansip\\_en.pdf](http://ec.europa.eu/archives/juncker-commission/docs/ansip_en.pdf)> accessed 19 January 2016.

<sup>23</sup> European Commission, ‘A Digital Single Market Strategy for Europe’ COM(2015) 192.

<sup>24</sup> *ibid* 3.

<sup>25</sup> *ibid* 6.

<sup>26</sup> *ibid*.

accessed in their own country<sup>27</sup>, and that a proposal would be brought to ensure the portability of content accessed legally in one Member State when an individual travels to another Member State<sup>28</sup>. Disappointingly, however, while stating that the copyright framework would be updated to suit a 'digital age', while specific mention of exceptions and limitations to copyright were mentioned, there is no reference to a common European copyright framework or copyright title in the Communication. The Digital Single Market Strategy could be effectively summed up as being a step towards further market integration for digital content access in the EU, but a small one.

The second event was the publication of a Resolution on a report into the functioning of the Information Society Directive by the European Parliament in July 2015<sup>29</sup>. This report has become known informally as the Reda Report, named after the MEP Julia Reda who acted as rapporteur, who has stated that one of its core findings was that the Directive has “not been able to hold step with the increase of cross-border cultural exchange facilitated by the Internet”<sup>30</sup>. Watered down by a significant number of amendments, the Resolution regrettably seeks to reiterate the territorial nature of copyright, stating “the existence of copyright and related rights inherently implies territoriality”<sup>31</sup>, and “calls for a reaffirmation of the principle of territoriality”<sup>32</sup>. As stated by Geiger et al., the Resolution in some ways constitutes a “missed opportunity”<sup>33</sup>, which does little to address specifically the issue of territoriality and in this respect is *less* ambitious than the Commission strategy appears<sup>34</sup>, a point acknowledged by Reda, who stated after the approval of the Resolution that it constituted a great step forward, but also a “tragically” missed opportunity. Somewhat paradoxically, however, and seeming to cause more reason for hope for a unified approach to copyright in the digital single market, called upon the Commission to

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<sup>27</sup> *ibid* 7.

<sup>28</sup> *ibid* 8.

<sup>29</sup> European Parliament, 'Resolution of 9 July 2015 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' P8\_TA-PROV(2015)0273.

<sup>30</sup> Julia Reda, 'Reda Report Draft – Explained' <<https://juliareda.eu/copyright-evaluation-report-explained/>> accessed 20 January 2016.

<sup>31</sup> European Parliament (n 29) 6.

<sup>32</sup> *ibid* 7.

<sup>33</sup> Christophe Geiger and others, 'The Resolution of the European Parliament of July 9, 2015: Paving the Way (finally) for a Copyright Reform in the European Union?' (2015) 37 *European Intellectual Property Review* 683, 683.

<sup>34</sup> *ibid* 685.

consider an impact assessment into the creation of a single Copyright title for the EU<sup>35</sup>. Such apparent contradiction can only be the result of the contested nature of copyright law in the EU, and the 550 amendments indicating the differences of opinion between the Parliamentary groupings. Prior to the vote, the Committee on the Internal Market and Consumer Protection acknowledged that territoriality was a major stumbling block to the realisation of a single market and consumer access to content in different Member States<sup>36</sup>, whereas the original proposal by the Legal Affairs Committee reiterated the territorial nature of copyright. Of particular interest to this paper however is that despite these contradictions and the reluctance to consider a single unified copyright for the EU, the Resolution nevertheless does provide some cautious steps towards the removal of barriers to cross-border access to digital media in the EU, albeit in the form of content already legally accessed by a user in their Member State of residence. As the Resolution states, the European Parliament was of the view that “there is no contradiction between that principle [of territoriality] and measures to ensure the portability of content”<sup>37</sup>, acknowledging that consumers were too often prevented from accessing content made legally available in one Member State merely for reasons of geography<sup>38</sup>, and that it supported “initiatives aimed at enhancing the portability, within the EU, of online services of legally acquired and legally made available content”<sup>39</sup>. In December 2015, ensuring this form of access was addressed in the promised Commission proposal for a Regulation on Content Portability<sup>40</sup> (hereafter the Portability Regulation), indicating the first concrete step towards further integrating of the digital single market.

### **The Portability Regulation Proposal: - Cautiously Ambitious, or Ambitiously Cautious?**

The Portability Regulation therefore constitutes the first concrete legislative proposal published under the auspices of the Digital Single Market Strategy, a mere seven months

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<sup>35</sup> European Parliament (n 29) 28.

<sup>36</sup> Committee on the Internal Market and Consumer Protection, ‘Opinion on the Implementation of Directive 2001/29/EC on the Harmonisation of Copyright and Related Rights in the Information Society’ (2015) 2014/2256(INI) paras 12, 15.

<sup>37</sup> European Parliament (n 29) 6.

<sup>38</sup> *ibid* 9.

<sup>39</sup> *ibid* 15.

<sup>40</sup> European Commission, ‘Proposal for a Regulation on Ensuring the Cross-Border Portability of Online Content Services in the Internal Market’ COM(2015) 627.

after the announcement of the Strategy itself. Aside from the speed with which the Commission is working in this field<sup>41</sup>, perhaps the most surprising dimension of the Proposal by the Commission on Portability is the legal instrument chosen to facilitate cross-border access to works. In proposing a Regulation, legally binding on all Member States without the requirement of national transposition as dictated by Article 288 of the Treaty on the Functioning of the European Union<sup>42</sup>, the Commission appears to be seeking to prevent any potential deviations from the proposed text. Indeed, in its explanatory text accompanying the proposal, the Commission states that a Regulation would ensure that laws facilitating the portability of content would enter into force at the same time, and “guarantee that right holders and online service providers from different Member States are subject to the exact same rules”<sup>43</sup>. As such, the Commission is demonstrably more ambitious than in previous initiatives, which have been marked by a more hesitant approach to legislating, beginning with the non-binding 2005 Recommendation on Collective Rights Management<sup>44</sup>, roundly criticised as ineffective and doing little to facilitate cross-border access to works while arguably leading to concentrations in the market for the Anglo-American musical works repertoire in the digital sphere<sup>45</sup>. Similarly, upon concluding itself that the Recommendation had been limited in its success, the Commission replaced it with a Directive in 2014<sup>46</sup>, which has also been criticised for both its limited ambition and the insufficient harmonisation of member states laws<sup>47</sup>, impacting upon the effectiveness of the Directive as a means of facilitating access to works in the online environment. Furthermore, rather than applying to the licensing of works generally in the EU, the Directive is limited solely to collective rights management in the field of

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<sup>41</sup> Considerably noteworthy given the often significant delays, or in fact, failure to release proposals which concern copyright in the online environment, as discussed above.

<sup>42</sup> See also Case 34/73 *Variola v Amministrazione delle Finanze* EU:C:1973:101 at para.10

<sup>43</sup> European Commission, ‘Proposal for a Regulation on Ensuring the Cross-Border Portability of Online Content Services in the Internal Market’ (n 40) 4.

<sup>44</sup> Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services 2005/737/EC

<sup>45</sup> See Farrand, *Networks of Power in Copyright Law* (n 12) 48, 144; Alain Strowel and Bernard Vanbrabant, ‘Copyright Licensing: A European View’ in Jacques de Werra (ed), *Research handbook on intellectual property licensing* (Edward Elgar 2013) 50; Brinker and Holzmüller (n 13) 556–557.

<sup>46</sup> Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

<sup>47</sup> J Drexler and others, ‘Comments of the Max Planck Institute for Intellectual Property And Competition Law on the Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territory Licensing of Rights in Musical Works for Online Uses in the Internal Market’ (2013) No. 13-04 Max Planck Institute for Intellectual Property and Competition Law Research Paper 1, para 13.

musical works, meaning that other forms of media, such as audiovisual content and ebooks are not covered. In comparison to earlier, more cautious initiatives, the Portability Proposal introduces a maximum harmonisation approach, with the Commission stating in its Impact Assessment that “a directive would leave too much room for MS [Member States] to choose how to implement the relevant rules in their national legislation [entailing] a high risk that the conditions for access to the relevant subscription services would be different for consumers when travelling to different MS”<sup>48</sup>.

So what changes are introduced by the proposal? The proposed Regulation is a short document, containing twenty-nine recitals but only eight Articles, of which six could be considered as central to the functioning of the Regulation, with Article 6 on the treatment of personal data constituting a general obligation to act in accordance with existing data protecting laws<sup>49</sup> and Article 8 mandating that the Regulation would enter into force twenty days after publication in the Official Journal of the European Union, and then apply throughout the EU six months later. Article 1 sets this out the objective of the Regulation, which is to ensure that “subscribers to online content services in the Union, when temporarily present in a Member State, can access and use these services”. The objective as presented gives rise to two thoughts; the first of these is that the objective itself is not made immediately clear, and depends on being read in conjunction with Article 2, which provides definitions to terms used in Article 1. The second is that while the Commission is demonstrably ambitious in its choice of legal instrument, its aims with the Regulation are somewhat more cautious. The purpose of the Regulation is not, as some may hope, to create a pan-European system of access to digital media, irrespective of national borders<sup>50</sup>. In this respect, the Regulation does little to change the current territorial nature of copyright, or indeed substantive copyright law in any way, but instead requires that where content is subscribed to in one Member State, it can then be accessed when the subscriber travels to another Member State. Indeed, under Article 4, and in a way not dissimilar to the

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<sup>48</sup> European Commission, ‘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’ (n 19) 25.

<sup>49</sup> Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data and Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, respectively

<sup>50</sup> Significant numbers of academics working on European copyright law have been advocating for a unified copyright title for some time; see for example P Bernt Hugenholtz, ‘Harmonisation or Unification of European Union Copyright Law’ (2012) 38 *Monash University Law Review* 4; Geiger and others (n 33).

Satellite and Cable Directive<sup>51</sup>, for the purposes of licensing of content from copyright holders, access to the service will be deemed to occur solely in the Member State of residence. This portability objective is operationalised through obligations placed upon content providers under Article 3, which requires that online content providers enable subscribers to access and use that online content service when temporarily present in another Member State, whether that constitutes news, Scandinavian crime dramas or sporting events. This does not impose a guarantee of home state quality upon the content provider however, with the Commission arguing that the intention of Article 3 is to ensure that a “provider shall not be liable if the quality of delivery of the service is lower, for instance due to limited internet connection”<sup>52</sup> in the state in which they are temporarily present.

Yet what guidance is given for terms such as ‘Member State of residence’ and ‘temporarily present’? The terms are explained in Article 2 of the Regulation, which provides definitions intended to ensure uniform interpretation throughout the EU<sup>53</sup>, state that a subscriber is to be considered as any consumer who “on the basis of a contract for the provision of an online content service with a provider, may access and use such service in the Member State of residence” (with consumer defined as anyone acting outside the course of their business, trade, craft or profession, in line with the definition of consumer provided in the 2011 Consumer Rights Directive<sup>54</sup>). An online content service is a service as defined by Articles 56 and 57 TFEU, and which constitutes an audiovisual media service under the Audiovisual Media Services Directive<sup>55</sup>; namely that it is a provider of content that informs, educates or entertains; that content is disseminated by means of an electronic communications network; and that the audiovisual media service is either a television broadcast or on-demand service<sup>56</sup>. Furthermore, for the purposes of the Regulation, this will also cover services “the main feature of which is the provision of access to and use of

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<sup>51</sup> Directive 98/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

<sup>52</sup> European Commission, ‘Proposal for a Regulation on Ensuring the Cross-Border Portability of Online Content Services in the Internal Market’ (n 40) 8.

<sup>53</sup> *ibid* 7.

<sup>54</sup> Directive 2011/83/EU on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC and repealing Council Directive 85/577/EEC and Directive 97/7/EC

<sup>55</sup> 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

<sup>56</sup> *ibid*, Article 1

works, other protected subject matter or transmissions of broadcasting organisations, whether in a linear or on-demand manner”, so long as they are either provided **online** upon the basis of payment of money, or where the subscriber’s Member State of residence is verified by the provider, in the case of non-payment services. The Regulation, it must be stated, does not address non-Internet based means of disseminating audiovisual works, which remain governed by the Satellite and Cable Directive<sup>57</sup>, which is to be subject to its own review and potential revision<sup>58</sup>. This broad definition of online content service in the proposed Regulation means that services such as Netflix or Amazon’s Prime on-demand video service are covered by virtue of being provided on the basis of a fee-paying subscription. Free-to-view services not subject to residency verification would ostensibly not be covered; however, the Commission in recital 17 indicates that this verification of residency may be by means of information “such as payment of a license 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 will be relied upon if they “enable the provider to have reasonable indicators as to the Member State of residence”.

This dimension of the Regulation is somewhat unclear, if we consider the concept of geo-blocking, which the Commission is seeking to regulate in this Regulation when used to restrict access to online audiovisual media services. By way of example, the BBC iPlayer produces something known as the ‘Outside UK’ error message when a user tries to access the service from outside the UK. The way in which geo-blocking works is that each country is allocated a range of valid IP addresses by the Internet Assigned Numbers Authority (IANA), which is part of the Internet Corporation for Assigned Names and Numbers (ICANN). These IP addresses are allocated to a regional Internet registry, such as RIPE NCC, which allocates IP ranges for countries in Europe, the Middle East and Central Asia. As the BBC states with regard to the Outside UK error, “because of the way BBC iPlayer is funded, only users with registered UK IP addresses can access our programmes”<sup>59</sup>. Therefore, IP addresses outside of the UK range cannot be used to access this service (i.e.,

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<sup>57</sup> Directive 98/83/EEC (n 51)

<sup>58</sup> More general information can be found at European Commission, ‘The Satellite and Cable Directive - Digital Agenda for Europe’ (*Digital Agenda for Europe*, 26 November 2015) <<http://ec.europa.eu/digital-agenda/en/satellite-and-cable-directive>> accessed 21 January 2016.

<sup>59</sup> BBC, ‘Outside UK - Why Does iPlayer Think I’m Outside the UK?’ (*BBC iPlayer Help*, 2016) <[http://iplayerhelp.external.bbc.co.uk/tv/in\\_the\\_uk\\_message](http://iplayerhelp.external.bbc.co.uk/tv/in_the_uk_message)> accessed 21 January 2016.

geo-blocking). However, when discussing the proposed Regulation, the BBC states that the Commission has confirmed “BBC's iPlayer would be exempt from the rules because it does not verify a user's country of residence”<sup>60</sup>. This does not appear to be correct based upon the way in which geo-blocking works – as previously mentioned, when using the iPlayer, if a user tries to access the service from outside the UK, the user is informed that their IP address indicates that they are not in the UK – if, however, someone is in the UK, they are then able to access the service. The counter-argument to this may be that this IP check does not verify the individual’s **residence**, only their **presence**<sup>61</sup>, and therefore does not constitute a residence check, meaning that the BBC falls outside of the remit of the proposed Regulation. However, *if* this is the case, then this leads to the conclusion that an IP address cannot function as a verification of residence<sup>62</sup>, only of an individual’s presence in a particular Member State. This would then mean that the Commission’s statement in the Impact Assessment that an IP address can act as a proxy for establishing habitual residence<sup>63</sup> is inaccurate, and that furthermore recital 17 of the proposed Regulation should be changed to either omit reference to IP address, or alternatively, reworded as an additional requirement rather than a singular requirement as it appears to be through the use of the word ‘or’. Alternatively, if an IP address were to be considered a reasonable indicator of residence, this would mean that any geo-blocking based on a range of IP addresses would constitute ‘verification of residence’ for the purposes of the Regulation, resulting in services such as the iPlayer being included. Indeed, any online audiovisual media service using geo-blocking based on IP address ranges would be covered by the Regulation, with only those services using no verification at all being excluded – as access to these would already be possible due to the absence of any geo-blocking measure, the Regulation would not serve any particular purpose as they do not pose any significant barrier to cross-border media access to residents and non-residents. Ultimately the regulation of public service broadcasters in the online environment such as the BBC, which

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<sup>60</sup> Kevin Rawlinson, ‘Netflix and Other Services to Be Available on Holiday’ (*BBC News*, 9 December 2015) <<http://www.bbc.co.uk/news/technology-35051054>> accessed 21 January 2016.

<sup>61</sup> The concept of ‘temporary presence’ in the Regulation will be discussed below.

<sup>62</sup> On this point, it must also be considered that an IP address can be misleading with regard to presence as well as residence, particularly with the use of techniques such as IP spoofing, as well as the use of Virtual Private Networks; on this, see Benjamin Farrand, ‘The Digital Economy Act 2010: A Cause for Celebration or a Cause for Concern?’ (2010) 32 *European Intellectual Property Review* 536.

<sup>63</sup> European Commission, ‘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’ (n 19) 24.

rely upon some form of public funding to fulfil their functions, is best suited to consideration in reviews of the Cable and Satellite Directive and the Audiovisual Media Services Directive, both of which are currently being undertaken as part of the Digital Single Market Strategy<sup>64</sup>; for the purposes of the Portability Regulation, however, it is the ambiguity with regard to the use of IP addresses as a means of residence verification that must be resolved.

Another potential (and indeed, related) problem with the Regulation is that while “Member State of residence” is defined as the Member State in which the consumer is habitually residing, and “temporarily present” as the “presence of the subscriber in a Member State other than the Member State of residence”, keen observers will note that this wording of temporarily present does not make reference to any length of time. Rosati at the IPKat blog has pondered whether “a week can be temporary enough for the sake of the Regulation, while a month would be too long?”<sup>65</sup>, whereas Rose and Potts at *fieldfisher* state that temporarily has been given “a wide interpretation and appears to mean anything other than permanent residency”<sup>66</sup>. A related question, not directly addressed in the Regulation, the explanatory text of the Impact Assessment, is that when travelling, will a user **only** have access to the content for which they have subscribed in their Member State of residence, or will they also be able to access content provided in the state in which they are temporarily resident? This could be inferred from a strict interpretation of Article 4, which as stated, considers the access and use of the service to occur solely in the Member State of residence. From the viewpoint of general integration into the cultural life of the second state, individuals working in France may wish to access (for example) TV series available on Netflix in French that they may not be able to access when at home in the UK. A strict interpretation of Article 4 would consider that the UK resident staying in France is still in the UK for the purposes of Netflix access, preventing access to the French-language version. If the intent is to enable greater cross-border access, the Commission may want to revise

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<sup>64</sup> European Commission, ‘Audiovisual Media Services Directive (AVMSD) - Digital Agenda for Europe’ (*Digital Agenda for Europe*, 30 November 2015) <<https://ec.europa.eu/digital-agenda/en/audiovisual-media-services-directive-avmsd>> accessed 21 January 2016.

<sup>65</sup> Eleonora Rosati, ‘EU Commission Unveils next Steps for Copyright Reform, Including Draft Content Portability Regulation’ <<http://ipkitten.blogspot.co.uk/2015/12/breaking-eu-commission-unveils-next.html>> accessed 18 January 2016.

<sup>66</sup> Nick Rose and Beverley Potts, ‘Content Portability Regulation’ (*fieldfisher*, 16 December 2015) <<http://www.fieldfisher.com/publications/2015/12/content-portability-regulation>> accessed 18 January 2016.

the proposed Regulation to put in place a guarantee that someone temporarily resident in a Member State should be able to access services in that state in the same way as to those services accessible in the home state. Indeed, given the movement of individuals throughout the EU, there are many different ‘temporary’ circumstances that the Regulation seeks to cover – from the company executive who travels to another Member State for a two-day meeting, or the family going on a two-week summer holiday<sup>67</sup>, through to the 270,000 students and 52,000 members of academic staff who spent time in another Member State as part of the Erasmus+ programme in the 2012-2013 academic year<sup>68</sup>, or even the posted worker sent for anywhere up to twenty-four months to another Member State<sup>69</sup>. Therefore, to impose a strict time limit upon when a subscriber is deemed to no longer be ‘temporarily resident’ could serve to defeat the purpose of the Regulation. The Commission itself states in its Fact Sheet on the Regulation that the “proposed rules do not set any limits for the use of the portability feature, as long as the user resides in another Member State”<sup>70</sup>. On the issue of temporarily present, the Commission Impact Assessment states, the “main defining feature is that such presence does not change the habitual residence of the subscriber”<sup>71</sup>, and that the objective of the Regulation would not be served by “fixed period of temporary presence which would imply checks on the exact duration of consumers’ presence in MS other than his or her MS of residence”<sup>72</sup>.

This is not to say that there is no problem with the definition as provided. Article 5(1) mandates that any contractual clauses that restrict the portability of online content, whether between right-holders or content providers, or those content providers and subscribers, will be deemed unenforceable, and that furthermore, under Article 7 this has retroactive effect, applying to contracts already concluded between right-holders and

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<sup>67</sup> See European Commission, ‘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’ (n 19) 19.

<sup>68</sup> European Commission, ‘Erasmus: Facts, Figures and Trends’ (2014) 4.

<sup>69</sup> Regulation No 883/2004 on the coordination of social security systems provides under Article 12(1) that a posted worker shall be subject to the legislation of the first Member State for up to twenty-four months, after which they then can be subject to the legislation of the Member State in which they are posted.

<sup>70</sup> European Commission, ‘Press Release - Making EU Copyright Rules Fit for the Digital Age - QUESTIONS & ANSWERS’ (*Press Release Database*, 9 December 2015) <[http://europa.eu/rapid/press-release\\_MEMO-15-6262\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-6262_en.htm)> accessed 18 January 2016.

<sup>71</sup> European Commission, ‘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’ (n 19) 24.

<sup>72</sup> *ibid* 25.

content providers. Article 5(2) however states that right-holders may make use of “effective means” to ensure that a subscriber is only temporarily present in another Member State, rather than having changed their habitual Member State of residence, so long as the required means are “reasonable and do not go beyond what is necessary to achieve their purpose”. The Regulation does not provide any guidance as to what may be considered reasonable and necessary, and states that the means by which temporary residence is to be determined would be left to right-holders and content providers<sup>73</sup>. This does not seem satisfactory, given the desire expressed by the Commission to ensure uniformity and consistency in the Regulation’s application – by leaving this to be agreed between right-holders and content providers, the terms and conditions applied to checks of ‘temporary presence’ may well be different depending on the right-holders, the content providers, and potentially the Member State in which the content is licensed. For example, the BBC has announced that it will allow UK TV license holders to access the iPlayer from outside the UK, with *The Times* stating before the publication of the Proposal that this would be facilitated by an access code, albeit one that would expire after “several weeks”<sup>74</sup>. There is also the question of content provided by different right-holders to the same content provider, such as Netflix – for example, what is *House of Cards*, produced as a Netflix Original series, could be accessed from outside the UK indefinitely, while a popular series like *Daredevil*, licensed from Disney since its acquisition of Marvel, may only be available for two weeks outside of a country of origin? Or to take another example, suppose that Disney permitted its content to be accessed for six months while ‘temporarily present’ in another Member State if the habitual Member State of residence was the UK, but only three months if it was France? This would risk dissimilar conditions being applied to consumers in different Member States of the EU, as well as doing little to resolve issues regarding cross-border access to media. It would not be conducive to the realisation of the Digital Single Market strategy to resolve the problem of portability by creating a problem of unequal treatment for consumers in different Member States. Furthermore, more clarity would be required regarding the technical means to determine whether someone is habitually resident, or temporarily present – would this be by IP address range, in which the individual would have to return to their home state in order to log into the service?

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<sup>73</sup> *ibid.*

<sup>74</sup> Elizabeth Rigby, ‘BBC Plans Secret iPlayer Codes to Let Britons Watch TV Abroad’ *The Times* (London, 3 October 2015) <<http://www.thetimes.co.uk/tto/sport/article4574927.ece>> accessed 21 January 2016.

This would have two implications – the first, that it would appear to defeat the desire of the Commission, as indicated in the Impact Assessment, not to put specific time restrictions on temporary presence and implied checks of this. The second, returning to an earlier concern, is that of what the IP address proves – is it residence or presence? It would appear inconsistent for it to be considered evidence of presence only when considering whether a service is verifying an individual’s residence, but proof of residence when requiring a check as to whether someone who has left their own Member State is just temporarily present in another. This would appear to be an issue in the Regulation that requires further scrutiny.

### **What the Future May Bring**

As may be evident from the previous section, the criticisms levelled in this article against the proposed Regulation are technical in nature, rather than against the objectives of the Regulation in its entirety. Indeed the ambition demonstrated by the Commission to give legal effect to the stated goal of bringing down barriers to the realisation of a digital single market, an initiative that has been subject to several false starts, is commendable. The Regulation constitutes a cautious first step, seeking only to ensure that the rights afforded to subscribers to an online content service in one Member State retain those already existing rights when they happen to travel. Yet it nevertheless constitutes a step, and one that indicates a potential trend in EU law-making. But it must not be the only step. It must be stated that some content right-holders seem favourably predisposed to the Regulations, with the chairman for the Alliance for Intellectual Property referring to the move as “a huge opportunity for the UK’s creative industries”<sup>75</sup>. Similarly, content providers such as Sky released a statement commenting that “we will need to consider the plans in detail, but we welcome anything that helps customers get even more value from their subscriptions”<sup>76</sup>. In comparison, and indicating the need for further action, other right-holders seem somewhat more sceptical; a representative of PACT, a trade body for content producers, stated that “any intervention that undermines the ability to license on an exclusive territorial basis will lead to less investment in new productions and reduce the quality and

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<sup>75</sup> Rawlinson (n 60).

<sup>76</sup> *ibid.*

range of content available to consumers”<sup>77</sup>. In essence, some content producers are concerned that this first step constitutes the first assault upon territoriality in copyright. If copyright reforms begin with the extension of a consumer’s rights across a national border when they travel, how long until this incremental step leads to a belief that consumers should be able to access content anywhere in the EU? As Batchelor et al. comment, this view is based upon a perception that measures that seek to limit the impact of territoriality of copyright, including prohibiting geo-blocking, undermines the way in which content is created and financed<sup>78</sup>. This would impact, for example, the charging of different prices in different regions<sup>79</sup>, or the practice of content ‘windowing’, in which content is gradually made available in Member States subject to time delays, which “allows firms to co-ordinate and maximize profit-enhancing publicity and to take advantage of particular market idiosyncrasies”<sup>80</sup>. One such example in the UK is that while series 8 of Doctor Who, a particularly popular BBC-produced science-fiction series, has been available on Netflix in Germany, Switzerland, the US, Canada, Australia and New Zealand since August 2015<sup>81</sup>, Netflix subscribers in the UK do not yet have access. UK subscribers only gained access to series 7, which was broadcast from September 2012 to May 2013, in mid-2015. This practice of windowing the content is presumably to maximise sales of physical media such as DVDs and Blu-Rays. Nevertheless, it does place UK-based subscribers at a disadvantage when compared to Netflix subscribers in other regions and further demonstrates the partitioned nature of the digital single market. At the time of writing, series 9 of Doctor Who, which finished broadcasting in December 2015, is rated 220 in Amazon UK’s DVD and Blu-Ray bestsellers rankings, despite only being available for pre-order for a March 2016 release date.

The Portability Regulation as proposed does little to challenge this, instead only permitting for access to content legally subscribed to in the Member State of habitual residence,

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<sup>77</sup> Martin Blaney, ‘EC Unveils Controversial Content Portability Plans’ (*ScreenDaily*, 9 December 2015) <<http://www.screendaily.com/news/digital/ec-unveils-controversial-content-portability-plans/5097809.article>> accessed 23 January 2016.

<sup>78</sup> Bill Batchelor, Ben Allgrove and Mark Agnew, ‘Digital Disruption: The Practical Implications of the EU’s Digital Single Market Agenda’ (2015) 36 *European Competition Law Review* 379, 379.

<sup>79</sup> *ibid* 380.

<sup>80</sup> Claude E Barfield and Mark A Groombridge, ‘The Economic Case for Copyright Owner Control over Parallel Imports’ (1998) 1 *The Journal of World Intellectual Property* 903, 929.

<sup>81</sup> James McArthur, ‘Is Doctor Who Season 8 on Netflix?’ <<http://www.netflixupdate.com/is-doctor-who-season-8-on-netflix/>> accessed 23 January 2016.

meaning that content producers' concerns regarding windowing are somewhat premature. However, on the same day as the Portability Regulation proposal was published, the Commission also published a Communication titled "Towards a Modern, More European Copyright Framework"<sup>82</sup>. This Communication at a discursive level suggests that the small step of content portability is part of a giant leap for copyright reform regarding cross-border access, arguing that "a more European framework is needed to overcome fragmentations and frictions within a functioning single market"<sup>83</sup>. The Commission itself refers to the Portability Regulation as only constituting a "very short term" action<sup>84</sup>, stating that it intends to "inject" more single market into current EU copyright rules, including addressing issues of territoriality, as well as adapting copyright rules to new technological realities<sup>85</sup>. Interestingly, however, while the Communication discusses establishing online content services 'without frontiers'<sup>86</sup>, it does not mention geo-blocking specifically, despite referring to the difficulties in accessing audiovisual media on a cross-border basis and the increasing use of Virtual Private Networks (VPNs) as a means of circumventing these digital territorial blocks to view legally available content<sup>87</sup>. This is arguably an example of a use of geo-blocking that could be considered unjustified for the purposes of Commission initiatives, and one that the Commission must ensure it addresses as part of its Digital Single Market Strategy, given that in January 2016, Netflix announced that it would be introducing measures to prevent the use of VPNs to access its service, allegedly at the behest of content producers concerned about these circumventions<sup>88</sup>. This has followed the BBC blocking access to its iPlayer through VPNs since October 2015, when it launched a US-based version of the service<sup>89</sup>. While the Commission states in its Communication that its measures in this field will include "supporting right holders and distributors to reach agreement on licenses that allow for cross-border access to content, including catering for

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<sup>82</sup> European Commission, "Towards a Modern, More European Copyright Framework" COM(2015) 626.

<sup>83</sup> *ibid* 2.

<sup>84</sup> *ibid* 2–3.

<sup>85</sup> *ibid* 3.

<sup>86</sup> *ibid*.

<sup>87</sup> *ibid* 4.

<sup>88</sup> Julia Greenberg, 'Netflix's VPN Ban Isn't Good for Anyone—Especially Netflix' (*WIRED*, 16 January 2016) <<http://www.wired.com/2016/01/netflixs-vpn-ban-isnt-good-for-anyone-especially-netflix/>> accessed 23 January 2016.

<sup>89</sup> KG Orphanides, 'BBC iPlayer VPN Access Blocked ahead of US Launch (Wired UK)' (*Wired UK*, 20 October 2015) <<http://www.wired.co.uk/news/archive/2015-10/20/bbc-iplayer-vpn-access>> accessed 23 January 2016.

cross-border requests from other Member States”<sup>90</sup>, the Commission must ensure that it does not leave the resolution of these issues to market and voluntary-agreement based solutions. Given the limited success of previous initiatives based on this approach, it must push on with greater legislative initiatives in this field. Should the Commission as earlier mentioned wish to tackle ‘unjustified’ geo-blocking as part of its Digital Single Market Strategy, facilitating rather than restricting cross-border access is one field where it should continue to demonstrate ambition.

### **Concluding remarks**

The proposal for a Regulation on Content Portability appears at first glance to be a comparatively unambitious, even cautious incremental step away from the status quo, in which cross-border access to audiovisual media works is severely restricted. Furthermore, the Regulation does not significantly alter the nature of copyright as a territorial right, with the implications for the single market that such rights create. However, placed in the context of the Digital Single Market Strategy, and the Commission’s own acknowledgement that the Regulation is a small, short-term measure, there is hope that we are seeing the beginning of a much more ambitious initiative for copyright reform in the EU, that may result in the ‘more European framework’ that the Commission ostensibly desires. As the Commission states at the end of its recent Communication, “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 [...but these] complexities cannot be a reason to relinquish this vision as a long-term target”<sup>91</sup>. With such a view being expressed by an institution that in has previously taken a very cautious approach to legal reform of territoriality of copyright, while the Regulation may constitute one small step for cross-border access, it may nevertheless be one giant leap for Commission copyright policy.

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<sup>90</sup> European Commission, ‘Towards a Modern, More European Copyright Framework’ (n 82) 6.

<sup>91</sup> *ibid* 12.