

12 Feb 2016

### Call for Views on the European Commission's proposal for legislation on cross-border portability

The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations within the creative and cultural industries. While many of these create works and performances professionally and make decisions relating to both commercial and non-commercial use of those works and performances, they also use and access works in an individual private capacity. Some of our member organisations also represent amateur creators and performers. Our members also include collective rights management organisations which represent right holders and which enable access to works of creativity.

A list of BCC members can be found at <http://www.britishcopyright.org/bcc-members/member-list>.

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#### General comments

The BCC welcomes the European Commission's Regulation on Portability and takes the view that this is a positive development under the Digital Single Market Strategy.

Right holders recognise and understand the concern that consumers travelling temporarily within the EU should be able to access content to which they have legal access in their own Member State. This draft Regulation deals with that specific case and, in its earlier submissions on this matter, the BCC has already agreed that there is a need for a specific and tailored solution.

From a right holders perspective, the Regulation must achieve this without undermining the existing safeguards which copyright affords to territorial licensing arrangements and without increasing the challenges and problems already faced by right holders when enforcing copyright and related rights.

Furthermore, as the European Commission recognises, online music services and e-books are already portable and relevant licensing structures are already in place. Nothing in this Regulation should undermine those services and structures.

The definition of "Online content service" (Article 2 *Definitions*) is important for positioning the Regulations within the overall market place for online creative industry services but we are unclear what is meant by "a service, the main feature of which is the provision of access to and use of works, or other protected subject matter or transmissions of broadcasting organisation whether in linear or an on-demand manner". Does this mean that clearance issues linked to rights of reproduction and all forms of communication to the public, including broadcasting rights and rights of making available on demand are affected by application of the Regulation and the legal fiction adopted?

## Consumer value

**The Regulation seeks to ensure that people from the UK and other EU states are able to access the same services they have subscribed to at home when they are travelling elsewhere in the EU. Do you agree that this is something consumers should be able to do, and does the Regulation meet consumer expectations?**

The Regulations must not be a platform for unauthorised access to services by those who are not properly linked to a service which they are legitimately entitled to access “at home” whether as a subscriber or otherwise.

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## Temporary access

**The Portability Regulation seeks to permit temporary access to services while a person is in another EU country, for example on holiday or on a business trip. Does the current definition of temporary achieve this effectively?**

The Regulation seeks to cover a person having legitimate access to services while “temporarily present” in another EU Member State with the result that they will be permitted to have “temporary access” to those services in circumstances where “normal” national rules would otherwise apply.

The definition needs clarification and linking to effective multi-layered authentication to show that the nature of the access is really linked to a “temporary” or “transitory” presence in a place for a short or limited time period that is outside the Member State where the genuine subscription is meant to apply.

Members in the music sector indicate that, if it is decided to specify a limit to the obligation under Article 3(1) this should not prevent services from offering portability beyond that period on a voluntary basis. In such voluntary cases, the legal fiction provided under Article 4 would not apply. Whether “temporary access” granted under the Regulation is restricted or not, the Regulation must be linked to effective multi-layered authentication showing the nature of the access.

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## Limitation to subscription services

**The Regulation will apply only to paid subscription services and other subscription’s services which have mechanisms in place to allow verification of the subscriber’s country of resident (for example, via a television licence). Is this the right scope for the Regulation?**

As we have previously stated, the Regulation is intended to provide a tailored solution to a specific problem and should not be further extended. We agree with the scope of the Regulation as laid out in the question above. However, the issue of “authentication” is essential to the successful application and limitation of such access. See our views under “verification” below.

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## Definitions

**Are the definitions of subscriber, consumer and member state of residence sufficient?**

It is important to clarify the scope of what constitutes the Member State in which a subscriber is “habitually” residence to provide a proper base line for application of the provisions of Article 4.

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## Verification

**Are required verification measurer adequately defined? Is the requirement that they should be “reasonable” workable?**

Authentication should be mandatory.

From the perspective of right holders in underlying works, our concern is to protect the discretion in Article 5(2) that right holders may require service providers to make use of effective means of verification and would argue that “reasonable” and “do not go beyond” should be sufficient at the level of the Regulation.

The issue of what form of authentication, both now and in the future, is reasonable and necessary in practice will need elaboration and greater clarity in terms of requirements. We understand that film and TV platforms have informed views on how this might work in practice and underlying right holders look forward to working with them on this.

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**Localisation of copyright relevant acts**

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**Will the contract override provisions and the change so that copyright-related acts necessary to provide portability would be viewed as taking place in the home Member State sufficient to support the introduction of portability?**

This provision creates doubt over the scope of existing contracts. For consumer contracts, for example, the costs of reviewing all terms and ensuring that compliant authentication terms are built in to all contracts for genuine “portability access” could be a burden for business.

The Commission states that the proposal will not oblige right holders and service providers to renegotiate contracts as it will make unenforceable any provisions in contracts contrary to the obligation to provide for cross-border portability. However, in practice, this approach does not obviate for the need for review of contracts. In practice, service providers and platforms will need to consider what new/additional terms are necessary to enable compliance with the Regulations.

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**Application to existing contracts**

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**To simplify the introduction of portable services and avoid lengthy contract renegotiation, the Regulation applies to existing contracts and acquired rights. Are these provisions effective and how will they impact right holders and service providers?**

The lack of definition of time for what amounts to “temporary presence” allows for numerous different contractual “definitions” (which in turn may be open to judicial challenge).

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**Quality of service**

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**Is it practical that the provider of an online content service would need to inform subscribers about the quality of the service accessed outside the home Member State?**

The BCC suggests that it will be helpful if providers are able to warn travellers who may rely on the legal fiction set out in the Regulation that any access secure from “temporary presence” in another Member State will be subject to the local quality of infrastructure, such as internet access.

The same quality of service may not be a universal practicality.

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**Delivery timescale**

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**Are there any issues (e.g. technical concerns) with the Commission’s proposal that the regulation would come into force 6 months after agreement (predicted to be in 2017)?**

There are both technical and practical concerns with this short timescale.

**Supporting creativity**

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