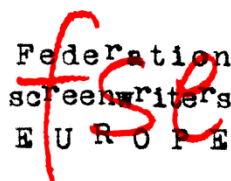


MAKING PORTABILITY WORK:

KEY PRINCIPLES FOR THE FILM AND AUDIOVISUAL SECTOR

Monday, 18th January 2016



The European Parliament and the Council of the European Union are set to examine the European Commission's proposal on ensuring the cross-border portability of online content services in the internal market¹. The undersigned organisations of film directors, screenwriters, authors, film/TV producers, sports rights owners, publishers, distributors, and cinema exhibitors represent a wide range of skills and activities in Europe's audiovisual industries. **We support balanced measures to provide consumers with temporary access to online film and TV services to which they have legally subscribed, when they are travelling throughout the European Union away from their habitual residence, while avoiding the risk that acceptance of pan-EU licensing will be compelled, either by accident or design. However, we cannot support measures that interfere with the economic and legal system for financing and distributing audiovisual works and content in Europe for the benefit of**

¹ COM(2015) 627 final.

consumers – an ecosystem notable for its output, and on which jobs, growth and cultural diversity depend, and which itself relies upon the ability to enter into exclusive, single territory licenses.

Unfortunately, the draft Regulation proposed by the European Commission is based on an incomplete impact assessment² with no concrete evidence of its effects on the market and which does not fully appreciate how the sector functions. As a result, it lacks crucial safeguards repeatedly advocated by the audiovisual sector. Accordingly, in order to protect the foundation on which audiovisual content is financed, marketed and distributed³ which has enabled our sector to offer consumers more than 3,000 audiovisual online services across Europe⁴, we urge that certain key modifications are made to the draft Regulation.

The following principles would establish a fair, appropriate and efficient balance to achieve portability in line with demonstrable consumer demand⁵ while preserving the possibility to apply territorial exclusivity as necessary to maintain an effective economic model for content creation, marketing and distribution.

1) Effective and robust authentication must be an absolute obligation for the relevant online content services

Given the proposed mandate which would **oblige** online content service providers to enable portability, **the application of the ‘legal fiction’ must be limited to those online content service providers employing effective and robust authentication of subscribers.** In full compliance with the EU data protection acquis, the draft provisions relating to authentication need to be strengthened to prevent the de facto imposition of pan-EU licensing as well as any abuse of portability functionalities. At present, the proposal simply states that rightholders ‘may’ require authentication. **In order to ensure a level playing field, the Regulation (Article 2(e), Article 4 and Article 5(2)) must include an absolute and uniform obligation to ensure that subscribers are effectively authenticated as a pre-condition for the application of the legal fiction.**

2) The definition of “temporarily present” must be narrowed

In order to preserve **the ability to apply territorial exclusivity, the concept of ‘temporary presence’ in the Regulation should better reflect the intention of providing EU citizens with portability while on vacation or on a business trip in another Member State.** The current wording of the Proposed Regulation would mandate portability for a period of time that could potentially run until the subscriber becomes habitually resident in another

² SWD(2015) 270 final. For example, the Impact assessment omits to identify the costs related to the renegotiation of contracts: “Costs associated to the renegotiation of contracts are very difficult to estimate as they would depend on various factors such as the number of relevant contracts, the extent of changes that parties would want to introduce, the current practices of online service providers (e.g. with regard to authentication tools) and the duration of the given contract. It is expected that the longer the duration of the contract, the more important would be for the parties to renegotiate its terms. We have not been able to obtain any estimation of such costs” (page 42).

³ Case studies on the financing and distribution of recent European films & television series (IVF/FIAPF/IFTA/MPA). http://www.ivf-video.org/new/public/media/FIAPF_IFTA_IVF_MPA_Case_Studies_July_24_2015.pdf.

⁴ European Audiovisual Observatory (see [here](#)).

⁵ According to Eurostat (http://ec.europa.eu/eurostat/statistics-explained/index.php/Tourism_statistics_-_intra-EU_tourism_flows), tourism trips (made for private or professional purpose) made by EU residents in 2013 to another EU Member State as a destination had an average duration of one week (7.1 nights). The recent Eurobarometer survey mentions that just over half (54%) of subscribers have never tried to use their subscriptions in other countries and see no need to do so in future (p. 86). <http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2059>

Member State. Therefore, the insertion of ‘transitory’ and ‘limited period of time’ in the body of the Proposed Regulation together with accompanying changes in the relevant recitals would make clear that there must be a limitation, while leaving room for more specific arrangements to be developed in the marketplace.

In addition, it is important to clarify the scope of what constitutes a subscriber’s Member State of **residence in order to ensure genuine portability and to avoid short-term portability expanding to become de facto pan-EU availability, in conflict with other exclusive licenses granted in the normal course of exploitation.** The current wording of the proposed Regulation allows for portability for any length of time elsewhere in the EU, as long as such stay/ travel does not change the subscriber’s ‘habitual residence’ (to the other Member State). The term ‘habitual residence’ is an undefined term, and its meaning in the context of the proposed legislation creates legal uncertainty (for consumers as well as for right holders), with the result that there will be no uniform or clear understanding of circumstances under which the legislation will apply. It is therefore essential that the Regulation include clear references to practical factors which comprise “habitual residence”, including but not limited to: the maintenance by a subscriber of banking facilities, maintaining a postal address in such Member State, or other factors illustrative of ongoing, habitual or permanent ties to such Member State.

Beyond the absolute need to address authentication and “temporarily present” as outlined above, other important issues should be considered and addressed:

– **The service provider mandate**

The Proposed Regulation would mandate online content service providers to enable cross-border portability on an EU wide basis once a service is portable in the Member State of residence. This significantly exacerbates the weaknesses highlighted above. **Given the costs associated with securely providing portability, the Regulation should not deter the development of tailored and local market based portability solutions in line with the diverse needs of European consumers.** It would be inappropriate for the vast majority of European citizens to be required to bear the costs of those consumers who wish to benefit from specific portability solutions tailored to their needs.

– **A workable transition period**

The lack of appropriate safeguards as described above would require the parties to reassess and renegotiate thousands of contractual agreements. **A six months transition period is insufficient to manage the legal and practical aspects due to the application of the Regulation to existing contracts and acquired rights.** Ultimately, the length of the transition period will also depend on whether key amendments are made to the proposed Regulation but it is essential that there is sufficient time, such as 2 years, to allow the audiovisual sector to implement the necessary changes ahead of the Regulation coming into force. The Regulation should also specify that its dispositions would not apply retrospectively.

– **A legislative instrument in line with international law and the three-step test**

Copyright is a property right and is protected by the Charter of Fundamental Rights of the European Union as well as by national constitutions and several international Treaties. The Proposed Regulation would operate as a limitation on the exercise of certain exclusive rights protected by international and European copyright norms. Depending on how it is applied, the Regulation could interfere with the way in which rightholders license content including

for cross-border portability. The proposed Regulation should therefore contain the customary reference to the three step test in order to ensure its compliance with international law⁶.

Conclusion

Copyright law is the foundation on which the success of the EU's audiovisual sector rests and which delivers demonstrable benefits for consumers. It supports the commercial freedom to choose from a range of options for the production, financing and dissemination of films and audiovisual content across Europe. Rightholders can respond to consumer demand for each work by electing to license each audiovisual work on a territorial, multi-territorial or pan European basis. Territoriality provides the foundation for the financing and distribution of culturally diverse audiovisual works.

In particular, it enables the financing and EU-wide distribution of films and TV programmes from smaller EU countries, language areas and cultures more economically sustainable, through mechanisms such as multi-lateral co-productions. Reports by the European Parliament⁷, the European Audiovisual Observatory⁸ and the Charles River Associates study commissioned by the European Commission⁹ have all confirmed that **licensing on a territory-by-territory basis is essential to raising financing for films, audiovisual productions and sports events, which require massive upfront investments, dedicated local marketing and distribution efforts, and which involve the hard work of many people over several years.** Territorial exclusivity also supports the development of the fast growing audiovisual online services across Europe, of which there are now over 3,000¹⁰.

In order to preserve the ability to apply territorial exclusivity, we urge the European Parliament and the Council of the European Union Member States to duly take into account the safeguards and principles set out above that are of fundamental importance to ensure that the EU continues to enable a virtuous circle of investment in high skilled jobs, cultural diversity and technological innovation in the audiovisual sector, to the benefit of European consumers.

We remain at your disposal and look forward to further discussing the key principles outlined above.

⁶ The three-step test is set out in the Berne Convention as well as in the TRIPS Agreement, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty and the EU Copyright Directive. Article 13 of the TRIPS provides that "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder".

⁷ [European Parliament resolution of 9 July 2015 on harmonisation of certain aspects of copyright and related rights, paragraph 13](#): "Points out that the financing, production and co-production of films and television content depend to a great extent on exclusive territorial licences granted to local distributors on a range of platforms reflecting the cultural specificities of the various markets in Europe; that being so, emphasises that the ability, under the principle of freedom of contract, to select the extent of territorial coverage and the type of distribution platform encourages investment in films and television content and promotes cultural diversity; calls on the Commission to ensure that any initiative to modernise copyright is preceded by a wide-ranging study of its likely impact on the production, financing and distribution of films and television content, and also on cultural diversity".

⁸ European Audiovisual Observatory. Study on territoriality and its impact on the financing of audiovisual works.

<http://www.obs.coe.int/documents/205595/8261963/IRIS+plus+2015en2.pdf/ad5c5a8f-4e85-4e3c-b763-9c763895da1e>

⁹ http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study1_en.pdf

¹⁰ European Audiovisual Observatory (see [here](#)).

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