

Digital Single Market Strategy – Portability legislation:

Key principles for the audio-visual sector

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On behalf of the undersigned organisations of film/TV producers, publishers, broadcasters, distributors, cinema exhibitors and sports rights owners, active in the European audio-visual landscape, we would like to respectfully outline a number of **key principles** related to the forthcoming legislative proposal on portability expected this December 2015.

To achieve the objectives of the Digital Single Market, we must continue to build on the **strength of copyright and neighbouring rights**¹. Copyright as a property right is protected by the EU Charter of Fundamental Rights as well as by national constitutions and several international Treaties. In this respect, the concepts of contractual freedom, exclusive rights and territoriality are crucial elements that enable and incentivise investment, drive technological innovation and ensure high quality production, marketing and distribution as well as enable creative and financial risk-taking. We believe that **mandating** portability will hamper innovation in the Digital Single Market, impair contractual freedom and harm smaller players. Market coercion should be avoided and underlying intellectual property rights must be fully respected.

The EU should look to its vibrant online marketplace to continue to provide innovative business models and features, including portability, by acknowledging the importance and primary role of market-driven solutions in a fast growing technology-reliant environment. The best way to promote such innovation is through market-led growth that further *enables* the private sector to adapt and develop new services that are responsive to evolving consumer interests and real, demonstrable demand. These services should be encouraged.

We would like to underline some of the key principles that should be addressed in any legislation on portability. Market-driven initiatives offering portable services are already a reality and these principles will help promote further innovation and develop market-led solutions to the benefit of consumers:

- **Portability** should only refer to enabling legitimate subscribers to an online service that is offered against payment of monetary consideration and already portable in their Member State of residence, and whose subscriptions can be reliably authenticated, to access that service when temporarily on business or holiday elsewhere within the EEA.

¹ As previously stated by our organisations in the context of the Digital Single Market Strategy, we stand ready to contribute further to the overarching “growth and jobs agenda” set out by the European Commission. Indeed, copyright-intensive sectors form the cornerstone of the European digital economy that generates 7 million quality jobs, contributes approximately EUR 509 billion to EU GDP and produces a trade surplus (OHIM/EPO Study, 2013). European citizens have access to more than 3,600 audio-visual online services compared to fewer than 700 at the end of 2008. We are living in a period of unprecedented change where new innovative services throughout the entire value chain are constantly being launched, with a resulting ever-growing diversity of content and services offered to European audiences.

Our solutions:

- As the market itself is developing portability offers, the express purpose of any legislative initiative should be to **support existing demand-driven** initiatives by means of **a narrow legal fiction** to "localise" the subscriber in her/his Member State of residence even when s/he is temporarily in another Member State (EEA) on holiday or business, thereby avoiding implicating the laws, including in particular on copyright, in that other Member State (EEA). The legal fiction would only operate where certain important conditions are expressly met.
- The details should be worked out in contractual arrangements between licensors and licensees, such as platform operators, but the legislation must provide the legal hook for the following:
 - **Robust and effective authentication:**
 - **Multi-factored authentication (by technical and non-technical means) by the platform is necessary** to confirm the subscriber's identity and permanent address or habitual residence (in full compliance with relevant data protection norms).

Authentication ensures that the legislative intervention does not go beyond the Commission's stated policy goals into de facto pan-European licensing.
 - **Member State of Residence:** Reference to permanent address or habitual residence to be unequivocal about the distinction between genuine portability and cross-border access respectively.
 - **Temporary:** The precise meaning of being "temporarily elsewhere" should be left to the marketplace. However, this component of portability, which is closely linked to authentication, must be underpinned by the legislation.
 - **Technical feasibility:** The instrument should be without prejudice to the technical feasibility of providing portability of the on-line service, which includes being in a position to do so at an adequate quality of service. In other words, platforms will be expected to offer portability only where it is technically possible for them to do so at the level of quality expected by their subscribers.
 - In keeping with the principles of proportionality and subsidiarity, the instrument must be limited to what is necessary to facilitate portability from a pure legislative standpoint, while leaving **contractual freedom** to the market place to arrange all other details in their license agreements. This is

necessary to allow for adaptation as technology and consumer demand change and to give providers the freedom to craft the most suitable offer for their particular service.

- **Transition:** To minimise disruption to existing business arrangements and allow businesses to provide the best possible consumer experience, there should be a sufficiently long transitional period before application of this new instrument to existent licenses. Special consideration is required for the audio-visual sector so that it can maintain its economic viability and to ensure respect for acquired rights. Finally, it is worth reiterating that the legislative text must provide the appropriate legal basis for the above mentioned conditions, including in particular authentication and residency criteria, in order to avoid a situation where a very long transition period has to be adopted in order for the market place to adapt.
- **Three-Step Test:** The instrument should refer to and be fully compliant with EU and international copyright norms.

We work every day with the realities of diverse and evolving consumer demand in mind. Any proposed changes to the successful models described above must be backed by robust evidence, which is currently lacking, that a legislative intervention is warranted. It needs to be demonstrated conclusively that the legislative changes will generate additional quality jobs and stimulate economic growth in Europe rather than costing jobs and limiting growth or simply shifting employment and resources from one sector to another.

Instead of putting at risk a business environment which remains fundamentally fit for purpose – supporting at once creativity, investment and dissemination – we urge the European Commission to take due account of the specificities of the audio-visual sector and maintain a legal framework under which we can continue to be a driver for innovation, growth, quality jobs and cultural diversity across Europe.

We thank you for your consideration of these points and remain at your disposal in case of any questions.

Yours sincerely

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