



Position Paper

Cable Europe Position Paper on the Commission proposed Regulation on Content Portability

Introduction

The Commission's Digital Single Market Strategy shows a willingness to modernise EU copyright legislation and break down national silos. One particular aspect of this reform touches on the portability of copyright protected services, as the Commission considers that consumers are often prevented, on grounds of copyright, from using the content services they have acquired when travelling abroad.

The Commission proposed on 9 December 2015 a regulation on content portability.

Within Cable Europe, we believe that the portability of content within and across borders is an interesting proposal as this would enable subscribers to benefit from the content they have already paid for regardless of their location.

This seems to be a logical consequence driven by the emergence of IP technology, new devices and changes in customer habits.

Cable operators have launched new services to meet such customer demand, for example, services enabling cable subscribers to watch their content on computers, tablets and/or smart phones, and want to offer their customers access to their services wherever they are in the EU.

We believe that, in order to be successful, legislative intervention towards portability of lawfully acquired audiovisual content, needs to cover different points.

We advocate the following:

Balanced rules which take into account the legitimate interests of consumers, rights holders and service providers

Service providers should not be caught between the expectations of consumers (to enjoy portability) and those of rights holders (to preserve their rights). One should bear in mind that current rights clearance is a very complex process and that this Regulation can only be successful and have an impact in practice if a more efficient approach to rights clearance is taken.



Affordable Out-of-Home Rights

Portability of content across borders is only possible if portability of content is already possible at national level. In order to offer portability at national level, cable operators need to acquire Out-of-Home rights (ie watch your TV show in the office instead of at home) in addition to In-Home rights (ie watch your TV show with a tablet in your bedroom rather than on a TV screen in your living room). Some rights holders do not grant operators online/Out-of-Home rights at national level leading to ‘black outs’. An easier licensing of online/‘Out-of-home rights’ of television programmes should therefore be achieved in the context of the review of the “Cable” chapter of the Satellite and Cable Directive as well as at national level. The success of portability across borders will depend on the possibility for operators to acquire Out-of-Home rights at reasonable prices.

Support for the “ Legal Fiction”

Cable Europe supports establishing a “legal fiction” for all content services which clarifies that the place of provision and reception of the service is the same even when the customer accesses the service from abroad.

A pragmatic approach to habitual residence and temporary presence abroad

It is essential that the Regulation gives sufficient guidelines as to the adequate level of determining the “habitual residence” of consumers. Strict requirements are neither necessary nor justified, in particular for consumers that buy a cable subscription. “A digital cable TV subscription” should be added to the indicators currently outlined in recital 17 of the Regulation (a contract for broadband or telephony). These indicators taken individually should be sufficient to determine the “habitual residence” of consumers. Most importantly, “temporary presence” in another Member State should be defined as the opposite of being present in the country of habitual residence. The notion of temporary presence should not be defined further in the regulation. In addition, any attempt to quantify in the licensing contracts the temporary presence in a Member State, for example by setting a limit of days, should be considered unlawful.

A longer transition period

Cable Europe believes that the transition period should be longer. Indeed the time needed to put this process in place, from an operational and technological perspective, is longer than 6 months. We believe that the transition period should be extended to at least one year.



Enabling cross-border portability

Consumers will expect online content services to be portable once the regulation is adopted. To achieve this, geo-blocking measures will have to be lifted for existing out-of-home services. Such geo-blocking measures are in place notably because of the contractual arrangements the provider of online content services have with right holders. Hence, article 3 (1) is actually about lifting geo-blocking and thus enabling the portability of services. The wording in article 3 (1) and the respective title should be changed accordingly:

“Article 3 – Enable cross-border portability of online content services”

(1) The provider of an online content service and the related holders of copyright shall not prevent a subscriber who is temporarily present in a Member State from accessing and using the online content service.”

(2) Paragraph 1 shall not extend to any quality requirements applicable to the delivery of an online content service (...).

A sustainable economic approach

Cross-border portability should be economically sustainable for service providers. Technological implementation costs should be recoverable. The possibility should also be left for service providers to set additional charges. This possibility should be provided for in article 3 of the Regulation.

Strictly defined ‘online service providers’

We understand the Commission’s proposal to limit the scope of cross-border portability to online content services which are lawfully provided in the Member State of residence of subscribers. We would clarify recital 13 in order to keep a restrictive approach to ‘online service provider’: *“This Regulation should, therefore, apply to online content services that a service provider, after having obtained the relevant rights from right holders in a given territory, provides to its subscribers on the basis of a contract, by any means including streaming, downloading, or any other technique which allows use of that content **over the internet**”*.



Reasonable authentication/verification systems

Rights holders can require service providers to verify the Member State of residence of subscribers to avoid abuses. However, as the Regulation rightly outlines, these means need to be reasonable, not only in terms of the potential impact on service providers, but particularly regarding the privacy of the customers. We observe a lack of awareness in the current public debate about the sensitivity of personal data when combining multiple pieces of information about the customer. Right holders should not have the right to claim re-negotiation of existing contracts under article 5 (2) of the draft-regulation.

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About Cable Europe

Cable Europe is the trade association that connects leading broadband cable TV operators and their national trade associations throughout the European Union. The regulatory and public policy activities of Cable Europe aim to promote and defend the industry's policies and business interests at European and international level. The European cable industry provides high speed broadband internet, TV services, and telephony into the home of 64.5 million customers the European Union.

This paper represents the views of the full members of Cable Europe, and not necessarily those of our associate members, partners or affiliates.



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