



## Committee on Legal Affairs

# Working Group on Intellectual Property Rights and Copyright Reform

Meeting of 18 February 2016 from 15:00 - 17:00

Brussels, meeting room: A5G-2

Draft minutes

### 1. Adoption of agenda.

The agenda was adopted.

### 2. Approval of minutes of meeting of 16 December 2015.

The minutes were approved.

### 3. Roundtable discussion on portability

The following spoke: Dietmar Köster, Maria Martin-Prat (Head of Unit "Copyright", DG CNECT), Therese Comodini Cachia, Julia Reda, Mary Honeyball, Alexia Maniaki-Griva (EPRS), Katharina Eisele (EPRS), Helen Keefe (Head of International Policy, BBC), Christophe Roy (Deputy Director Legal Affairs, Groupe Canal+), Janneke Slöetjes (Director, Public Policy Europe, Netflix), Mathieu Moreuil (The Sports Rights Owners Coalition), Davyth Hicks (Secretary-General, European Language Equality Network), David Martín (Senior Legal Officer, BEUC).

Mr Köster, who chaired the meeting, introduced the session dedicated to the Commission's proposal on the cross-border portability of online content services.

Maria Martin-Prat (**DG CNECT**) started by giving Members a presentation of the Commission's proposal. During the discussion with Members, some concerns were expressed, such as the risk that the proposal would become the first step for cross-border access, the risk of creating problems by defining in more detail the main concepts of the proposal and the implementation cost for SMEs. The real need for a monitoring mechanism was questioned and the need to avoid introducing burden for service providers and data protection was expressed. The Commission made clear that the regulation would not affect cross-border access and was only intended to deal with portability. Ms Martin-Prat also explained that the concept of habitual residence existed in law and was already defined by the Court of Justice. Regarding the costs for SMEs, she clarified that if the proposal for regulation mandated portability, it did not request the same level of quality to service providers, and would therefore not imply additional costs. A Member agreed that the concept of country of residence was an accepted concept but underlined that it evolved quickly (e.g.

one person can have different addresses/properties) and therefore it was difficult to put into practice. The Commission made clear that the proposal only asked the service provider to determine whether the consumer was habitually residing in a certain country (reasonable indication where a person has his/her habitual residence). It was also pointed out by the Commission that free services, and as a result BBC, were not affected by the proposal for the moment, and that it would be up to BBC to decide if it wished to provide BBC iPlayer across borders and also how it may determine and verify users' residence.

The discussion with the Commission was followed by a presentation by the **European Parliament Research Service** (EPRS) of an initial appraisal of the COM impact assessment. Alexia Maniaki-Griva (acting head of unit, EPRS) made some introductory remarks and left the floor to Katharina Eisele, the actual author of the paper. Ms Eisele emphasised the qualitative nature of the Commission's impact assessment but at the same time underlined that some of the assumptions upon which the IA is based would have need some further examination, for example the current and potential future consumer demand for portability. She also emphasised the lack of monitoring and evaluation provisions in the Regulation.

Ms Keefe (**BBC**) welcomed the proposal as it furthers the digital Single Market. The Commission proposal strikes a good balance by allowing free online content services to opt-in to the regulation, if and when it is possible economically and practically to offer portability, in a way that is appropriate to their service model and purpose. However, further clarification and legal certainty are needed around this optionality. For example, according to Ms Keefe, there is a need for a consistent definition of 'verification' - a basic sign-in to enable personalisation or targeted advertising may not verify residence - and clarity that the 'legal fiction' that the user remains in their country of habitual residence for the purposes of accessing the online content service applies to all laws relevant to content production and compliance, not only copyright. She asked whether the chosen means of verification should be clarified as a proxy for establishing 'habitual residence'. Finally, tightening such details is important to make clear that portability of home services is different from cross-border access to services based in another Member State. She pointed out that disruption of territoriality should be avoided.

Mr Roy (**Canal+ Group**) said that the proposal was a good thing, but underlined that the Group already proposed "download to go" services to its customers. He considered that what was important was not to challenge territoriality and copyright and to avoid allowing for a general and permanent portability. Mr Roy said that the proposal should be clarified in order to avoid implementing costs, disputes with consumers and rightholders and the possible distortion of competition due to different application of the regulation throughout the EU. Temporary presence should imply the act of travelling for a limited period of time (for example, according to Eurostat, European citizens are abroad 6 days/year in average), even if this would not prevent commercial negotiation to set a different time limit. As for habitual residence, the regulation should mention that it is the place of the main residence of the subscriber, where he/she regularly comes back after spending time abroad. Mr Roy explained that means of authentication should be put in place on the basis of a list attached to the Regulation (the IP address cannot be the only mean as it indicates where the subscriber is located but not the habitual residence). He clarified that free services and fee-based services

have different logic and the means of authentication are different. He finally asked not to create disproportionate burdens.

**Netflix** welcomed the Commission proposal and explained that it is important to have flexible means of verification, especially since maintaining a user-friendly interface for signing people up is immensely vital for the business and this can also affect the verification means. What is more, it was pointed out that the relationship between the rights holder and the content provider should inform essentially the extent to which verification means can be seen as being reasonable. The six months implementing period could be a bit longer. Even if the service provider would not be liable for the loss of quality, Netflix wants to develop a service which is good enough to ensure that there will be no loss of customers due to bad quality.

Mr Moreuil (representing **The Premier League and The Sports Rights Owners Coalition**) also welcomed the proposal, while stressing that territorial exclusivity is a key parameter. He explained that the proposal was not precise enough and should mention that the portability option was for a limited period of time. According to him, the time limit should be determined by the market (e.g. the contract could mention no time limits). Regarding the authentication system, Mr Moreuil said that it should be mandatory for platforms for identification. If the application of the regulation is retroactive, contracts will have to be renegotiated. He wondered what would be the situation if free services were carried out on another platform and if the content produced by another entity and carried on to the platform would be watched outside the territory.

The **European Language Equality Network** (ELEN) gave its view on the portability proposal, and more specifically on the challenges and opportunities for linguistic diversity. Mr Hicks broadly welcomed the Commission proposal. He explained that copyright, portability and geo-blocking had a huge language dimension, and mentioned geo-blocking as undermining regional/minority language usage, especially for cross-border minorities. He called for impact assessments on regional minority languages and for creating obligations to ensure international transmission for regional/minority languages content, especially for cross-border minorities and for services in all languages of a territory. Mr Hicks proposed the idea of territoriality of broadcasting rights based on language groups instead of state borders.

Mr Martín (**BEUC**) warmly welcomed the proposal as a step forward, including its scope - which does not only include paid services - and the legal fiction of article 4 that nevertheless do not solve the problem of cross-border access to content. He expressed BEUC's support to the absence of a specific time limit for temporary presence, as this would be arbitrary and he also pointed out that verification systems should be flexible. More guidance on appropriate and inappropriate verification means could thus be helpful. He welcomed the fact that the regulation would be applicable without renegotiation of contracts being necessary and within a short timeframe.

During the debate, the question on how service providers interpreted the regulation with regard to the possibility of merging local offers (currently consumers get the local repertoire only) and if there was a need to specify it in the regulation was raised. Netflix replied that

this was a commercial matter, but that clarification would be welcome. With regard to the economic impact of the regulation on business development, Netflix said that it would be limited and that global companies could bear the cost of encountering the large volume of data; it was not so sure about smaller companies though. For Canal+, the effects can be different depending on the text and the clarifications. If the text is unclear, rightholders would ask for the payment of more rights to compensate the risks of abuse. SROC said that it is difficult to measure the economic impact at this stage (contracts will be renegotiated) and if exclusivity was no longer protected, the value of the right would decrease. This was underestimated in the impact assessment. Accordingly, SROC pointed out the time limit is not clearly defined in the Regulation and that in any case this should be left to the market to decide. Finally, verification measures should be mandatory rather than optional and should include verification via credit card details, utility bills, etc.

BEUC brought forward the issue of data protection against the need to monitor constantly the users' precise location, as well as the need not to impose a disproportionate burden on consumers so as to access online content services across the borders. Regarding the means of verification in Recital 17, BBC's representative said that systems need to be practical, allowing cross-checking against a database. There is discussion about the definition of 'temporarily present'. In Ms Keefe's view, clarifying 'habitual residence' will help because that is the counterpart. If the Regulation was too prescriptive, greater technical and administrative costs would be incurred. Ms Reda explained that some cases of geo-blocking are not economically driven, such as in the case of linguistic minorities. She thus inquired what could be done to address these situations without affecting territoriality. ELEN agreed with Ms Reda's statement, but the Commission explained that the matter of languages was not pertinent to portability. BEUC warned that it should not be put too much burden on consumers for self-identification (requesting for ID, passport number, bank account, certificate of residence, etc.) to only access a service.

#### **4. Any other business**

None.

#### **5. Next meeting of the Working Group**

Wednesday 16 March 2016.