

Information Matters: Modernisation of EU copyright rules - an update (already!)

Paul Jones | 5 January 2015

Despite my scepticism, how timely did my post on 8 December ([Modernisation of EU Copyright](#)) prove to be? In it I anticipated some expected further developments around the EU's plans for the reform of copyright law, but little did I know that we would get the announcement so soon afterwards!

We now have the first major legislative developments under the [Digital Single Market Strategy for Europe](#). The Commission has not only published its expected **Communication** on developing its plans for copyright reforms but also a **draft Regulation** intended to ensure cross-border portability of online content¹.

THE COMMUNICATION (OR 'ACTION PLAN')

Under the umbrella of modernising copyright law for the digital age, the Communication covers some expected, and some less expected, plans. Particular points to note include:

1. Ensuring wider access to content across the EU. Here the message is "small steps". The first of these is dealing with the issue of **cross-border portability** (which the Commission has sought to press ahead with straight away - see section below commenting on the draft Regulation). The Commission acknowledges that this incremental approach is the only way to proceed because the digital single market - when it comes to copyright-protected content - is not yet a reality. **The territoriality of rights that in turn has developed territorial licensing models that in turn has developed particular financing structures are cited as significant obstacles.** As if it was ever under this illusion, the Commission recognises that ensuring wider access to creative content online and stimulating its circulation across Europe "*involves a wide array of policy instruments*" and requires a balance to be struck between, on the one hand, aiming for full cross-border access for all types of content with, on the other hand, the readiness of markets to respond to legal and policy changes and the availability of viable financing models. We are left with the recognition by the Commission that obstacles to the ultimate objective need to be removed gradually. We may hear more in the next few months as options are assessed and further legislative proposals contemplated. No more indicative timetable is given than this.

2. Copyright exceptions. The Commission notes that differences in the 'exceptions to copyright' provided at a national level across Member States are particularly visible. It's hardly surprising: most exceptions are optional for Member States to

¹ It has also published two draft Directives – one for online sales of goods, and another for the online supply of digital content (each likely to require amendments to the recently in-force Consumer Rights Act 2015)

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implement, and rarely are they defined in any great detail at the EU-level, leaving the Member State a choice on how to implement it. **The Commission notes that the disparity most affects education, research and access to knowledge.** It is remarked that some of the differences could limit the development of online courses, in-classroom use of technologies and digital materials and cross-border learning opportunities. What also comes in for mention - again - is the exception for **text-and-data mining** (TDM) where the Commission notes that "*the lack of a clear EU provision on TDM for scientific research purposes creates uncertainties in the research community*". Therefore, in order to make good on a commitment to ensure the framework on exceptions for access to knowledge, research and education is effective, the Commission will by Spring 2016 consider legislative proposals to implement the Marrakesh Treaty, meaning (so far as we know now):

- a. allowing public interest research organisations, for scientific research purposes, to carry out **TDM** of content they have lawful access to;
- b. providing clarity on the scope of the EU exception for '**illustration for teaching**', and its application for digital uses and to online learning;
- c. providing clearer rules allowing for greater use of **online and digital preservation techniques** by cultural heritage institutions; and
- d. supporting restricted-access/remote consultation of works held in research and academic libraries for **research and private study**.

3. Achieving a well-functioning marketplace for copyright. The dichotomy here is the need for rights-holders to license and be paid for the use of their content, including that distributed online; and the need to allow innovative online services to develop as those means of distribution. The observation though is that the value of the copyright is not shared fairly between rights-holder and distribution channel (eg, an online aggregation service like *YouTube*), especially where rights-holders cannot set licensing terms nor negotiate on a fair basis with potential users. From a copyright perspective, it is the rights of '**communication to the public**' and '**making available**' that come into focus here - their definition (in large part) determines what constitutes an infringing act and in turn gives a basis for claiming rights and negotiating licences and remuneration. Again, proposals will be made known by Spring 2016 and, specifically, we should learn then whether action is considered necessary on the definition of these important rights.

Despite the incremental approach, the long-term target remains the full harmonisation of copyright in the EU, in the form of a single copyright code and a single copyright title, with a single copyright jurisdiction with its own tribunal. Where trade marks and patents have ventured it seems copyright is set to follow - quite at what pace we'll see; and the million-dollar question being whether the UK will be around (in terms of still being an EU member state) to enjoy the ride?!

PORTABILITY OF ONLINE CONTENT: THE DRAFT REGULATION

As mentioned in the first half of this note, the one concrete step taken by the Commission so far is **to publish a draft Regulation for the cross-border portability of online content services (OCS)**. Put simply, this is intended to ensure that users who have subscribed to or acquired content in their home country (ie, their country of habitual residence) can access it when they are in another Member State. **The new right is a limited one - only subscribers from the original Member State will have access to the portable content.** It is not a right

for consumers in one Member State to have access to services in other Member States. This is the far more controversial issue of cross-border access (as opposed to *portability*), which may be addressed in the impending review of the *Satellite and Cable Directive*.

What is the obligation being imposed on service providers? Certain service providers will be obliged to enable cross-border portability but will not be required to obtain the relevant rights in each Member State in which the subscriber is **temporarily present**. This will work on the basis that access to the OCS in the *visited* Member State is deemed still to occur in the *home* Member State - ie, the right for copyright owners to bring infringement action in the visited Member State is removed. "Temporarily present" means presence of the subscriber in a Member State other than the Member State of residence, with no other qualification as to time or longevity of stay - this might imply that "temporary" can last as long as the subscriber is not considered habitually resident in the 'visited' Member State, and so perhaps not quite so 'temporary' as the wording initially suggests.

Which service providers will be affected? Those that can verify the **habitual residence** of its subscribers - this will be presumed where the OCS is paid-for. Where the OCS is not paid-for, then the Regulation will bite if the service provider opts to verify the subscribers' residence, ie as part of some registration process that is completed in order to access the OCS. If though a user simply accepts terms and conditions in order to view a free-of-charge OCS but does not register to do so, the service provider will not be obliged to provide/allow cross-border portability.

What online content services are caught? The Regulation applies to an OCS where "*the main feature ... is the provision of access to and use of works, other protected subject-matter or transmissions of broadcasting organisations, whether in linear or on-demand*". Quite how "the main feature" will be interpreted will be interesting to see - we know already from a recent CJEU ruling that videos made available on a newspaper's website will fall within the concept of a 'programme' under the *Audiovisual Media Services Directive* on which the definition is said to be based. If that logic is followed here then more OCS's are likely to be caught than might on first reading be the case.

Timing and transitional arrangements. The Regulation will come into force 6 months after its publication in the Official Journal - it will have direct effect and so will not need implementation into national laws. Whilst there is some way to go yet in terms of progressing the Regulation through the EU legislative process, the Commission does ideally want the Regulation to be fully effective during 2017, meaning publication in the second half of 2016 at the earliest. The 6-month period is to allow sufficient time for rights-holders and service providers to adapt to the new regime. Service providers in particular will need this time to amend the terms of use of their OCS's that are affected. And, when it does come into force, the Regulation will have **retrospective effect** - this means that contracts between rights-holders and service providers will not need to be re-negotiated; instead, provisions in those contracts that go against the obligation to ensure portability will be read-out of the contract and made unenforceable.

For more information on the draft Regulation or on the proposed reforms to copyright law, please contact [Paul Jones \(paul.jones@farrer.co.uk ; 020 3375 7254\)](mailto:paul.jones@farrer.co.uk), [Peter Wienand \(peter.wienand@farrer.co.uk; 020 3375 7355\)](mailto:peter.wienand@farrer.co.uk) or your usual contact at the firm on 020 3375 7000. Further information can also be found on the [Intellectual Property](#) page on our website.

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