



# ALLIANCE

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FOR INTELLECTUAL PROPERTY

**Alliance for IP response to  
Intellectual Property Office consultation  
on cross-border portability of online content services**

**January 2018**

The Alliance for Intellectual Property welcomes the opportunity to respond to the Intellectual Property Office consultation on the cross-border portability of online content services.

Members of the Alliance may make individual submissions and this is therefore intended as a high level response that seeks to answer some of the legislative policy questions in the consultations that impact on the audiovisual sector.

Alliance members and their sectors are supportive of balanced measures to provide consumers with access to film and TV services - online and via other more “traditional” broadcast mechanisms – via services to which the authorised consumer has subscribed legally, while s/he is temporarily present in a Member State other than her/his country of residence. The Alliance notes that represented organisations and their members are, individually, preparing to comply with this Portability Regulation from 1 April 2018.

The Portability Regulation provides benefits not only for UK consumers travelling to or within the European Union, but also for consumers from other EU Member States travelling to the UK.

**The Alliance is generally supportive of portability continuing to function after Brexit - for the benefit of all consumers and stakeholders - provided that the appropriate legal framework and safeguards can be established and enforced.**

Such a legal framework has to work both from a copyright perspective and also with respect to other areas of regulation, including in particular with regard to the provision of audio-visual media services.

## **Future relationship with the European Union**

The essential part of the Portability Regulation is the so-called “legal fiction” in Article 4 which deems the provision of an online content service under this Regulation to a subscriber who is temporarily away from her/his Member State of residence and is now present in another EU Member State - as well as the access to and the use of that service by the

subscriber or authorised used to be occurring solely in the subscriber's Member State of residence.

The functioning of this legal fiction and the Regulation is based on the reciprocity that exists between EU Member States. Such reciprocity will not exist between the UK and the EU after Brexit and the legal fiction cannot be applied to "localise" activities pertaining to cross-border portability of services for UK subscribers in the EU and for EU subscribers in the UK respectively in the absence of a specific arrangement between the UK and the EU that enables the continued application of the legal fiction. That **new, Brexit-based** agreement will have to recognise that the provision of cross-border portability services implicates not only copyright law, but also a range of other areas including in particular the regulation of audiovisual media services.

If no such agreement is reached, UK service providers would not be in a position to rely on the legal fiction in the EU to deliver what is required to ensure portability. There would be significant copyright and other legal implications for both UK businesses and consumers if the UK government were to create obligations similar to those contained in the Portability Regulation in the EU without the agreement of the relevant trading partners. In short, UK service providers who continue to provide portability after Brexit – in the absence of a reciprocal agreement between the UK and EU/EEA – would be at severe risk of breaching the rights of third party right holders in the EU<sup>1</sup>.

Without an agreement addressing these issues between the UK and the European Union, the Portability Regulation will no longer be able to function as a part of the law in force in the UK. There has to be a universal recognition of the legal fiction, if it is to remain workable. It is simply not within the sole gift of the UK legislature (nor for that matter industry on its own).

From a consumer perspective, it would obviously be highly unsatisfactory that a service that has been marketed to them and to which they subscribe should become (legally – via the Portability Regulation) portable in April 2018, only to **cease** being portable in April 2019 (or at the point at which any transitional period ends). This potential consumer disappointment – and consequent reaction - is only one reason that the need for Government's attention to this matter is urgent.

The Government therefore needs to make clear its intentions. We note that the Government intends to publish further guidance on the Portability Regulation in the coming months. This guidance should be accompanied by a clear statement of the concrete steps the Government intends to take/has taken already to secure an agreement which enables the Portability Regulation to continue to function legally after Brexit.

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<sup>1</sup> In addition, there is the chance that **other** factors would apply – for example that the content accessed by e.g. a UK-resident traveller who is temporarily on holiday in a hotel in France is, in fact, **not legal** to be viewed in France (for reasons **other than** copyright).

Throughout the process of negotiation, we would be pleased to work with you to help develop a solution to the problem identified.

## **Enforcement**

Given the uncertainties over the Brexit negotiations, the consultation sensibly identifies a number of existing legal mechanisms to enable enforcement of provisions in the Regulation. We also accept that it is reasonable to review whether the proposed enforcement regime has achieved its objectives. Decisions on enforcement should however be guided by the principle of the minimum required for compliance with the Regulation, so as to not give a misleading impression to stakeholders in the value chain, including - in particular - consumers.

## **About the Alliance**

Established in 1998, the Alliance for Intellectual Property is a UK-based coalition of 20 organisations with an interest in ensuring intellectual property rights receive the protection they need and deserve. Our members include representatives of the audio visual, toy, music, games, business software, sports, brands, publishing, retailing and design industries.

The Alliance's overriding objective is to ensure that intellectual property ('IP') rights are valued and that a robust, efficient legislative and regulatory regime exists, which enables these rights to be properly protected.

The Alliance is also proactive in supporting the promotion of IP through educational and consumer awareness initiatives and encouraging the development of IP training for businesses and individuals seeking to develop, produce and trade goods, services and content.

## **Alliance Members**

Anti-Copying in Design, Anti-Counterfeiting Group, Association of Authors' Agents, British Association of Picture Libraries and Agencies, British Association for Screen Entertainment, British Brands Group, BPI, British Toy and Hobby Association, Design and Artists Copyright Society, Educational Recording Agency, Entertainment Retailers Association, Film Distributors Association, Motion Picture Association, Premier League, Professional Publishers Association, Publishers Association, Publishers Licensing Society, UK Cinema Association, UK Interactive Entertainment

## **Contact details**

For further information or clarification please contact Eddy Leviten or Robert Magowan at [eddy@allianceforip.co.uk](mailto:eddy@allianceforip.co.uk) , [robert@allianceforip.co.uk](mailto:robert@allianceforip.co.uk) or 020 7801 1324.