



European Communities Trade Mark Association

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ECTA POSITION PAPER

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON ENSURING THE CROSS-BORDER PORTABILITY OF ONLINE CONTENT SERVICES IN THE INTERNAL MARKET

I. INTRODUCTION:

On 9 December 2015 the Commission presented the Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market, COM (2015) 627 final (“the Proposal”) as part of the Digital Single Market Strategy which has the objective of creating an internal market for digital content and services. It aims to remove barriers to cross-border portability so that users who have subscribed to acquired online content in their Member State of residence may access the same content even when they are temporarily present in another Member State.

ECTA has examined the Proposal and is submitting the following comments:

II. DEFINITIONS REQUIRING FURTHER CLARIFICATION

1. “Temporarily present” / “residence”

According to the Proposal content providers shall enable subscribers who are temporarily present in Member States other than their Member State of residence to access and use their online content service. Content providers usually are bound by numerous license agreements with right holders and strictly have to respect those rights. Such licenses are usually granted country by country and not for all EU Member States. Providing content to subscribers in countries where the content provider is not holding a license might infringe the (exclusive) rights of other licensees. However, limiting the subscribers’ possibility to access content from other Member States might interfere with their rights under the Proposal. For content providers it is therefore of high importance to have certainty when they are allowed – or even obliged – to provide access to subscribers from Member States different from their residence and for what period of time.

At the moment the Proposal does not provide the necessary clarity and leaves important decisions to the discretion of the content providers. The Proposal stresses at several occasions that content providers are acting lawfully when providing access to their subscribers who are present in Member States other than their Member States of residence,



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provided such presence is only temporary. The Proposal does not clarify the consequences or legal obligations of providers when the subscriber's presence in another Member State is not temporary (anymore).

According to the Proposal "temporarily present in a Member State" means the presence of a subscriber in a Member State other than the Member State of residence for a *limited period of time*. This definition does not contain any clear criteria for the evaluation which period of time is covered. Subscribers may spend a limited period of time in a Member State other than their Member State of residence for various purposes and therefore also for very different periods of time, all of them being limited. One may think of a person spending a few hours in another Member State while being on transit, a tourist spending his holiday abroad for one or two weeks, a commuter travelling to his workplace and back to his residence for a few hours every workday (or even staying at the place of his work from Monday to Friday only returning home on weekends, e.g. civil servants working for EU institutions in Brussels) or an Erasmus-student spending one or even two semesters in another country. As the Proposal does not further define what "a limited period of time" means all these situations seem to be covered.

A precise limitation of a "limited period of time" of several weeks or months obviously would be too inflexible. However, the consequences for content providers and their obligations need further clarification.

Content providers are only obliged to provide access to the subscribers as long as they are "*temporarily present*" in another Member State. If subscribers are present in another Member State for more than a limited period of time they cannot benefit from the new rights of the Proposal anymore. In order to avoid copyright infringement and/or interference with other license rights content providers might be obliged to prevent such subscribers from accessing content which might even require detailed monitoring of the country of their location which usually is done through the IP addresses of their internet access. As the Proposal currently does not provide for any guidance for content providers how to balance these conflicting rights it is left to their discretion. Content providers might either face serious legal or enormous bureaucratic issues and costs.

For these reasons it is necessary to provide more legal certainty to content providers. It should be clarified that they cannot be held liable for the infringement of copyrights (or other rights) of third parties when providing access to subscribers in other Member States than their residence. One solution might be a presumption that subscribers are temporarily present in another Member State when they are located in any other Member State that is not the Member State of their residence and as long as they do not inform the content provider of a change of their residence.

Furthermore, the definition of "temporarily present" is correlated to the definition of "Member State of residence". Under the Proposal that latter is defined as "*the Member State [...] where the subscriber has his or her actual and stable residence to which he or she returns regularly*". Considering that there are many individuals commuting among EU Member States for employment purposes constantly and some of them do not even return to their Member State of residence often, it may be preferable not to have the definition of "residence" relied on time criteria. One solution might be to omit the phrase "*to which he or she returns regularly*" from the definition at issue.

In brief, it may be in favor of legal certainty not to link the aforementioned definitions with time considerations. Once a subscriber has paid its subscriptions fees in a Member State he



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or she may be eligible to have access to the content covered by that subscription through any other Member State regardless of how much time he or she spends there.

2. “Subscribers”

According to the Proposal “subscriber” means any consumer who, on the basis of a contract for the provision of an online content service with a provider, may access and use that service in their Member State of residence.

This definition does not take into consideration that many services allow access to a group of users, e.g. family members of the contractual partner (the “main subscriber”). As not each of these users necessarily concluded a contract with the content provider there is some uncertainty as to whether all of them qualify as a “subscriber”. According to the definition of “subscriber” such a person may access and use services *on the basis of a contract*, which could mean that the subscriber personally has to be a contractual party.

Family members or friends of a main subscriber (being the contractual party) may be present at different locations. According to Recital 18 content providers must provide access to the same number of users as in their Member States of residence. This may support the understanding that not only the main user, but also further users having a special relationship with him benefit from the Proposal. However, in particular as Recitals are not binding it should be clarified that all of such users shall benefit from the rights under the Proposal independent from whether the main subscriber is located at the same country as such other users or whether they are all present in different Member States other than that of their residence.

One solution may be to explicitly state that as long as a subscriber pays subscription fees in a Member State any private use of the subscribed content can take place in any other Member State.

III. PRIVACY CONCERNS

The European Union and its Member States are dedicated to maintaining a high level of protection of personal data. Therefore, the Proposal provides that the processing of personal data under the Proposal, in particular for purposes of verification of the subscribers’ residence, shall be carried out in compliance with EU data protection rules.

According to the Proposal only the provider of an online content service provided *against payment of money* shall make use of effective means in order to verify the Member State of residence of its subscribers. The Proposal does not oblige content providers to monitor the current location of their subscribers. However, this seems to be inevitable as the rights under the Proposal only apply to EU Member States. As content providers usually are bound by copyrights and license agreements they have to know if their subscribers are trying to access content from other Member States (where access has to be granted according to the Proposal) or third countries (where the Proposal does not apply). Content providers might even have to monitor whether subscribers are more than “temporarily” present in another Member State and prevent them from accessing content if they cannot rely on the rights under the Proposal anymore.

From a merely technical perspective monitoring the location of subscribers through their IP addresses is no problem. However, processing of such personal data has to be proportional and serve a legitimate purpose. Also from this perspective a further clarification of the

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content providers' obligations seems to be necessary so that processing of personal data can be limited to a minimum.



ECTA, which was formed in 1980, is an organisation concerned primarily with trade marks and designs. ECTA has approximately 1,500 members, coming from all the Member States of the EU, with associate Members from more than 50 other countries throughout the world. ECTA brings together those practicing in the field of IP, in particular trade marks, designs, geographical indications, copyright and related matters. These professionals are lawyers, trade mark and patent attorneys, in-house lawyers concerned with IP matters, and other specialists in these fields. ECTA does not have any direct or indirect links to, and is not funded by, any section of the tobacco industry.

The extensive work carried out by the Association, following the above guidelines, combined with the high degree of professionalism and recognised technical capabilities of its members, has established ECTA at the highest level and has allowed the Association to achieve the status of a recognised expert spokesman on all questions related to the protection and use of trade marks, designs and domain names in and throughout the European Union, and for example, in the following areas:

- Harmonization of the national laws of the EU member countries;
- Community Trade Mark Regulation and Directive;
- Community Design Regulation and Directive;
- Organisation and practice of the EUIPO.

In addition to having close links with the European Commission and the European Union Intellectual Property Office (EUIPO), ECTA is recognised by WIPO as a non-Government Organisation (NGO).

ECTA does also take into consideration all questions arising from the new framework affecting trade marks, including the globalization of markets, the explosion of the Internet and the changes in the world economy.