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Intellectual Property Office
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Submitted electronically via email: copyrightpolicy@ipo.gov.uk

Re: Call for Views on the European Commission's Proposal for Legislation on Cross-Border Portability of Online Content Services¹

The Independent Film & Television Alliance (IFTA) welcomes the opportunity to provide written comments to the Intellectual Property Office (IPO) in response to its call for views on the European Commission's recently proposed Regulation dealing with the cross-border portability of online content services in the internal market.² IFTA has also joined in the comments filed by a coalition representing the content licensing sector in the United Kingdom, including Pact, the Motion Picture Association and the British Video Association.

While IFTA supports the proposed Regulation's goal of providing consumers with temporary access while travelling throughout the EU to the online film and television services to which they have legally subscribed in their country of residence, the proposed Regulation - as drafted by the Commission - undermines its own purpose by failing to establish the necessary legal certainties for compliance and failing to provide appropriate safeguards for content producers.

At stake is the future and viability of the independent film and television industry that require continuation of the contractual and commercial freedom to choose territorial exclusive licensing. Having already conveyed our views to the Commission, IFTA is now looking to the Member States, the UK in particular, and the European Parliament to ensure that the proposed Regulation does not disrupt the exclusive territorial licensing and distribution system that is at the core of independent production financing, marketing and distribution so that we can continue to provide European audiences with high quality, diverse and culturally relevant films and television programs. In that regard, IFTA urges the IPO to carry forward the following three simple and essential safeguards (more fully discussed below) that will ensure a fair balance between portability and the freedom to agree to territorial exclusivity:

¹ <https://www.gov.uk/government/publications/call-for-views-on-cross-border-portability-of-digital-services>.

² <https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-627-EN-F1-1.PDF>.

- 1. Effective and robust authentication of subscribers must be an absolute obligation** rather than an option (in the proposed Regulation right holders ‘may’ require authentication).
- 2. The concept of “temporarily present” in a Member State other than that of residence must be narrowed**, and defined as of a transitory nature and for a limited period of time.
- 3. If the proposed Regulation is to apply retroactively to contracts concluded and rights acquired before its effective date (as suggested by the Commission), it must be balanced with a workable transition period and specific language to preserve the initial authentication obligations of online service platforms.**

Territorial exclusivity is compatible with portability of online content so long as the appropriate safeguards are in place to avoid indiscriminate cross-border access to online content services. Should portability create a window for cross-border access, it would significantly and negatively disrupt the economic base of film and television production, in most instances based on territorial exclusivity. Absence of these fundamental safeguards will undermine our industry’s capacity to provide finance and produce the “online content” that is the very object of proposed Regulation on portability.

About IFTA and its Member Companies

IFTA is the trade association for the independent motion picture and television industry worldwide that is dedicated to protecting and strengthening its members’ ability to finance, produce, market and distribute independent films and television programs in an ever-changing and challenging global marketplace. Our organization represents more than 135 member companies from 22 countries, consisting of independent producers and distributors, sales agents, television companies, and institutions engaged in production finance.³ Roughly one-third of IFTA members are established in European countries, with 23 based in or having significant business operations in the UK.⁴ Collectively, IFTA members produce about 400 feature films annually and countless hours of television programming, both of which are increasingly found on emergent online platforms throughout the world.

Independent producers regularly secure both financing and distribution for each project through pre-selling exclusive distribution rights to local distributors on a territory-by-territory basis when the film is still in the development phase. In this exclusive licensing arrangement, the local (third party) distributor contractually commits, prior to production, to paying a minimum guaranteed license fee (“minimum guarantees”) in exchange for the exclusive right to distribute the finished product to the public in their particular territory. Those minimum guarantees are then collateralized by financial institutions which loan the funds to support the production (or are informally used to support private investment). Once revenue is generated

³ A complete list of IFTA members is available online at: <http://www.ifta-online.org>.

⁴ Altitude Film Sales, BFI - British Film Institute, Content Media Corporation International Limited, Distant Horizon, Embankment Films Limited, Entertainment One, Fortissimo Films, GFM Films, Goldcrest Films International, HanWay Films Ltd., Independent, K5 Media Group, LIONSGATE, Metro International Entertainment Limited, Metrodome International/Hollywood Classics, Mister Smith Entertainment Limited, Pathé, Phoenix Worldwide Entertainment Limited, Protagonist Pictures Limited, Reel One Entertainment, STUDIOCANAL, Umedia International and The Works.

from exploitation in their respective territories, of which online service subscriber fees are an element, the production loan is repaid and the parties endeavor to recoup their investment.

Another method frequently used in the EU is multi-territory co-production. The majority of EU Member States have signed bilateral co-production treaties with other individual Member States which ensure that films produced under those treaties may qualify as national films in both States. These agreements may be combined to permit co-productions with multiple Member States. Such co-produced films may thus benefit from access to public funds and incentives in each of the co-producing States. State funding will not, under normal circumstances, cover more than 50% of the overall cost of production and, in most countries, the prerequisite for access to such funding is that local distribution deals must be in place. As with the pre-sale model, such distribution deals are dependent on the commercial freedom of producers of license all rights to the local distributor's territory on an exclusive basis.

From 2004 to 2013 there were 510 co-produced films involving UK producers, with co-production partners contributing between 36 and 46% of the films' budgets. Some of the most critically-acclaimed independent films executive-produced by the UK in recent years have been co-productions. They include Yorgos Lanthimos's multiple award-winning *The Lobster* and Tom Hooper's *The Danish Girl*, nominated for several BAFTA awards in 2016.

High-end independent British films typically cover between 30 to 60% of their budget through such pre-agreed license fees (pre-sales) or distribution deals resulting from the use of official co-production arrangements, the balance coming mostly from a combination of public incentive funds and/or tax credits, as well as private equity and/or debt financing. A significant proportion of UK television dramas also rely on pre-agreed license fees from foreign broadcasters in order to close their substantial budgets, the UK broadcasters' license fee falling most often far short of covering the entire cost of production. Allowing online content service subscribers in other Member States cross-border access to the same content concurrently (and possibly in conflict with release through other channels) circumvents our industry's financing mechanism and business model.

This financing mechanism and business model is in response to marketplace realities that are based on actual consumer demand as assessed by local distributors who possess considerable knowledge of local cultural tastes and interests and are best placed to tailor marketing campaigns for non-national films to local audiences. The model also ensures that the considerable investment required to connect audiences with these films (minimum guarantee plus local release and marketing costs) is protected through the granting of territorial exclusivity. Local distributors go on to cover their risk by licensing relevant rights to the different media in the film value chain. The removal of territorial exclusivity from any link in that chain (e.g. online exploitation) will have a detrimental effect on the value of the film in the other segments and may even result in the rights remaining unlicensed. All forms of exploitation relate to each other: for instance the decision by a broadcaster to license television rights will often depend on the distributor committing to a prior release in the cinemas and the interest of an online platform is equally determined by such factors.

Portability of Online Content within the European Union

It is important to note that the market itself is attentive to audience demands for attractive content and convenient access. Many online platforms already provide portability between

devices and locations within the country of subscription and some online platforms already are moving toward providing portability in response to shifting patterns of consumer demand. There is no impediment under current law that would prevent them from doing so.

IFTA, and our industry colleagues, have long urged the Commission to allow these market forces to play out since this is a far more reliable mechanism to meet true consumer demand, rather than imposing artificial requirements through unwarranted regulation. However, we note that many local platforms lack the ability or resources to deliver up access throughout the EU at the quality or with the type of content that will allow them to compete with the larger, multi-national services. This will naturally need to be taken into consideration in the deliberations by the Member States and the European Parliament on the final text of the proposed Regulation.

IFTA's Concerns with the Proposed Regulation

IFTA's main concerns with the current draft of the proposed Regulation relate to the serious potential for harm to the system of territorial exclusivity that is at the core of independent production financing. We must preserve the strong copyright and licensing framework that encourages the creation, financing, marketing and distribution of compelling and diverse audiovisual programming that appeals to the entertainment, education and cultural interests of the world's audiences. It is critical that the creator and his/her business partners be able to rely on clearly defined exclusive rights and the freedom of contract through which to raise production finance, to pursue a national and global marketing and distribution plan that reaches the broadest audience, and to protect the content against theft and misappropriation.

Among other issues, the proposed Regulation does not sufficiently define "temporarily present" (in another Member State) nor does it mandate full authentication of subscribers to ensure that "portability" does not become permanent "cross-border" access to online content services. It also encompasses both subscription services (as to which no authentication requirements are imposed) and other services (if the provider can authenticate merely "location"), broadening the potential reach far beyond the subscriber base that is contemplated when content is licensed to the online platform initially based on expected future audience estimations and doing so without protection against sharing or misuse.

Authentication of Subscribers

Given the proposed mandate that would oblige online content service providers to enable portability, the application of the 'legal fiction' must be limited to those online content service providers employing effective and robust authentication of their subscribers. In full compliance with the EU data protection *acquis*, the proposed Regulation must account for multi-factored authentication (including technical and non-technical means) by the online content service provider to confirm the subscriber's identity and permanent address or habitual residence.

At present, the draft proposal simply states that right holders 'may' require authentication. In order to ensure a level playing field, the proposed Regulation (Article 2(e), Article 4 and Article 5(2)) must include an absolute and uniform obligation to ensure that

subscribers are effectively authenticated as a pre-condition for the application of the legal fiction as it pertains to the temporary portability of online content within the EU.⁵

Narrowing of “Temporarily Present”

In order to preserve the ability to apply territorial exclusivity, the concept of “temporarily present” in the Commission’s proposal must be revised to better reflect the intention of providing EU citizens with portability while on vacation or on a business trip in another Member State. The current wording of the proposed Regulation would mandate portability for a period of time that could potentially run until the online service subscriber becomes habitually resident in another Member State. This uncertainty presents the real risk of short-term portability expanding to become de facto pan-EU availability in the form of cross-border access to online content services, in conflict with other exclusive licenses granted in the normal course of exploitation. Furthermore, the term ‘habitual residence’ is undefined, and its meaning in the context of the proposed legislation creates legal uncertainty (for consumers as well as for right holders), with the result that there will be no uniform or clear understanding of circumstances under which the legislation will apply. It is therefore essential that the proposal include clear references to practical factors which comprise ‘habitual residence’, including but not limited to: the maintenance by a subscriber of banking facilities, maintaining a postal address in such Member State, or other factors illustrative of ongoing, habitual or permanent ties to such Member State.

Retroactivity and Workable Transition Period

As currently drafted, the Commission’s proposed Regulation is to be effective in a rapid six months following the day of its publication and also apply retroactively to all content licenses relevant to every online service as of that date. While the Commission has alluded to the licensing parties (content producers and online service platforms) negotiating the details of content protection, pricing and other license terms as this new regime is contemplated, the proposed timetable removes the ability to have meaningful engagement to reassess the thousands of contractual arrangements that will be affected.

If the proposed Regulation is to apply retroactively (as suggested by the Commission), it must be balanced with a workable transition period and specific language clarifying that the initial authentication obligations of the online service provider are preserved in all existing agreements. IFTA’s concern is that the sweeping language in Article 5(1) of the proposed Regulation will be interpreted broadly by licensees to eliminate ANY of the current contractual obligations with respect to the initial verification and authentication of subscribers, and possibly affecting the contractually defined licensed territory, rather than scrutinized with - razor like precision as intended by the Commission -- to render only those specific sub-clauses unenforceable that would block cross-border access to the online service by authorized subscribers while temporarily traveling within the EU.

Ultimately, the length of the transition period will depend on whether key amendments are made to the proposed Regulation but it is essential that initial authentication obligations are maintained and there is sufficient time to allow the audiovisual sector to implement the necessary changes ahead of the proposed Regulation coming into force.

⁵ IFTA’s concern is that the current wording of Article (5)(1) rendering certain aspects of pre-existing license agreements unenforceable has the unintended potential to encompass the initial authentication requirements for verification of subscribers which online platforms are contractually obligated to carry out in the first instance.

Conclusion

IFTA expresses its gratitude to the IPO for seeking input and for taking an active role in reviewing the Commission's proposed Regulation on the portability of online content in the EU that will indeed affect UK industry and consumers alike. As a key Member of the EU, the UK's contributions will carry significant weight as the European Parliament and by the Council of the European Union consider the Commission's proposal on the cross-border portability of online content services. In the meantime, IFTA and other industry members expect to make specific suggestions to amend the text of the Commission's proposed Regulation which we will share with the IPO.

We remain at your disposal and look forward to working with the IPO on this important topic.

Submitted by the Independent Film & Television Alliance



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