

Cross-Border Portability in the EU:

There's No Place Like Home



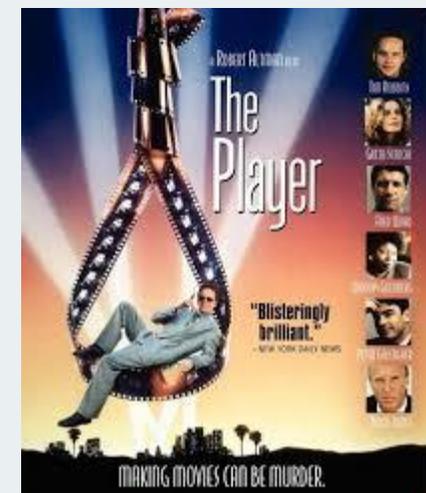
Ted Shapiro
Wiggin LLP - Brussels
14 March 2016
@ABA-BVA

DSM Strategy: Copyright Reform/ Territoriality

- EC © Communication and a Draft Regulation on Portability released on 9 December 2015
- Proliferation of devices and services
- The internet is mainstream
- 1000s of new online services
- Changes in the distribution landscape and in consumer behaviour
- Quick Win: Commission says EU consumers expect portability and demand will grow
- The lack of portability is the fault of licensing and commercial practices – particularly in the AV sector

Licensing in the AV Sector

- AV content tends to be licensed on an exclusive territorial basis
 - Pre-sale of rights
 - Producers maximise revenue in markets where demand is the highest and tailor content to the particularities of each territory
 - Producers to share the financial risk with distributors and invest in new content
 - What would be the impact of exposing the sector to unbridled competition?
- EC says it will respect the value of rights in the AV sector but they may not be talking about the same kind of exclusivity – they seem to like it toothless
- Meanwhile DG COMP and its PAY-TV CASE



PORTABILITY – The Main Issues

- **Portability is distinct from full cross-border access**
- **Proposed Regulation is a first baby step**
- **The Proposed Regulation does raise important questions:**
 - a rather limp approach to authentication and verification
 - a nebulous mechanism to localise exclusive rights
 - an unprecedented limitation on contractual freedom
 - a very broad notion of temporary presence,
 - unclear dividing line between the pay and free OCSs
 - a blink of the eye transition period.
- **RHs can license content on an exclusive territorial basis but the Regulation will undermine © territoriality**
- **Recognises that exclusive rights are implicated, but then of course it deals with that.....**



A REGULATION!!

- Legal basis: Article 114 TFEU permits adoption of measures whose object is the establishment and functioning of the internal market
- Directly applicable
- Member State implementation is not permitted
- “Amending” the EU copyright acquis via regulation, even if modifying only a sliver of copyright, will set an important precedent
- Commission says a regulation is the most appropriate vehicle to effect cross-border portability --28 versions of portability?
- Wherever you may roam (in the EU)
- No transposition period –Short transition period



How will the Regulation work?

- **Objective: Portability** – subscribers to online services can access and use when temporarily abroad in the EU
- **Definitions of key concepts?**
- **Platform Obligation**
- **Localisation of platforms and subscribers**
- **Nuking contractual freedom**
- **Respecting privacy**
- **Nuking pre-existing contracts and rights**
- **Effective tomorrow**



Localisation – What is a legal fiction?



- The mechanism locating the platform and the subscriber in her Member State of residence
 - while using the service abroad
 - to enable platforms to offer portability
 - without implicating © (or other laws), in other MS's.
- The rights acquired in one Member State are sufficient
- Only applies to legal services
- Can't contract around it
- Article 4 – SOLELY - is eerily similar to Article 1(2)(b) of the SatCab Directive – was that a legal fiction?
- Note the extra words – “shall be deemed to”
- What will be the impact on exclusive rights?
- Making Available supposed to take place everywhere
- Is this an exception or a limitation?



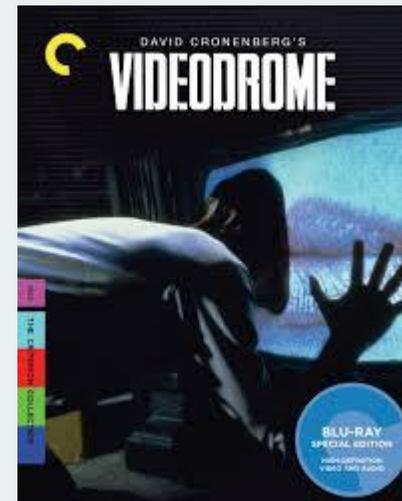
Localisation – What impact?

- A rather narrow intervention for portability only
- But it smells like a limitation on the exercise of rights
- Does it affect the scope/subject-matter of exclusive rights?
- RHs no longer able to prohibit services from providing portability even where that same content has been licensed to another platform on an exclusive basis
- This does seem to go to the heart of making available ---
- And just how long is temporary?
- Could the three-step test in Article 5(5) of the Copyright Directive be important. The Proposed Regulation makes no reference.



PLATFORM OBLIGATION (Article 3)

- The *legal fiction* enables cross-border portability but this makes it mandatory
- Two main safeguards:
 - platforms do not have to offer cross-border portability if they do not offer portability in the subscriber's habitual MS of residence; and,
 - platforms do not have to guarantee a level or quality of service in offering portability unless otherwise agreed



NUKING CONTRACTUAL FREEDOM (Article 5(1))



- A broad prohibition on restrictions in contracts
 - between RHs and platforms and
 - between platforms and their customers
- Any contractual provisions contrary to the platform obligation are unenforceable... to make portability work
- Otherwise RHs continue their licensing practices
- Limitation on the freedom of contract raises questions:
 - Will RHs be able to secure remuneration for portability
 - Stipulate conditions related to temporary presence
 - Define ongoing robust authentication
 - What about non-EEA contracts (foreign law)
 - What about services based outside the EEA?

Pay and Free Online Content Services (Article 2(e))



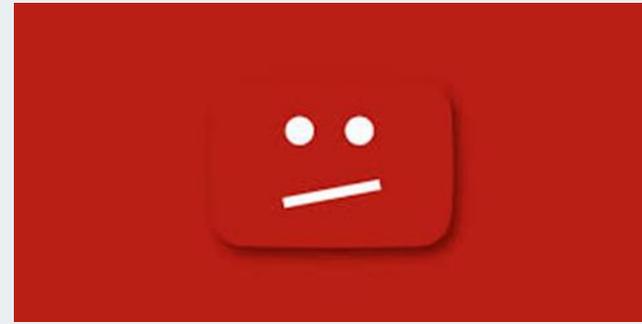
- An online content service is covered when:
 - lawfully provided online in the MS of residence on a portable basis; and
 - AV media service within the definition of AVMS Directive or a service whose main feature is the provision of access to works, other broadcast subject matter or transmissions
- A broad range of content/services/technologies
- Pay vs free: two scenarios ->
 - services provided for payment of money and
 - Free services provided that the subscriber's MS of residence is verified.
 - A kind of opt-in? But could it happen without the service wanting it to happen?



Obligation to Authenticate/Verify (Article 5(2))



- No obligation on platforms, onus is on RHs (cf., free services)
- Verification of
 - habitual residence of the subscriber; and,
 - the temporary presence in another MS
- RHs may require platforms to authenticate/verify, but it must be reasonable and proportionate.
- In the case of disagreement, it is likely to come down to the relative commercial strength of the parties
- So who is responsible? What happens if licensee and licensor cannot agree on the authentication measures? Does portability have to be provided anyway? Do licensors have a remedy against licensees which fail to authenticate or apply insufficient authentication measures?



Temporary Presence (Article 2(d))

- *"a presence of a subscriber in a Member State other than the Member State of residence."*
- Concept of habitual residence is not harmonised
- Commission wishes to keep the concept sufficiently flexible to accommodate: leisure, travel, work and study.
- This imprecision, including the fact that it encompasses no requirement of transience, is surprising, given that temporary is at the core of the notion of portability
- It would appear to catch long and/or regular periods of presence in other Member States.
- Conveniently this could include MEPs, Commissioners



Charging for Portability

- The Proposed Regulation does not rule it out
- A RH might argue that licences will include a broader grant of rights so its licensees should pay more
- A platform might argue that portability threatens to erode its exclusivity and that the actual value is neutral
- A commercial issue and dependent on leverage
- Impact Assessment even envisages it but the platform obligation and the ban on contractual overrides make it complicated...



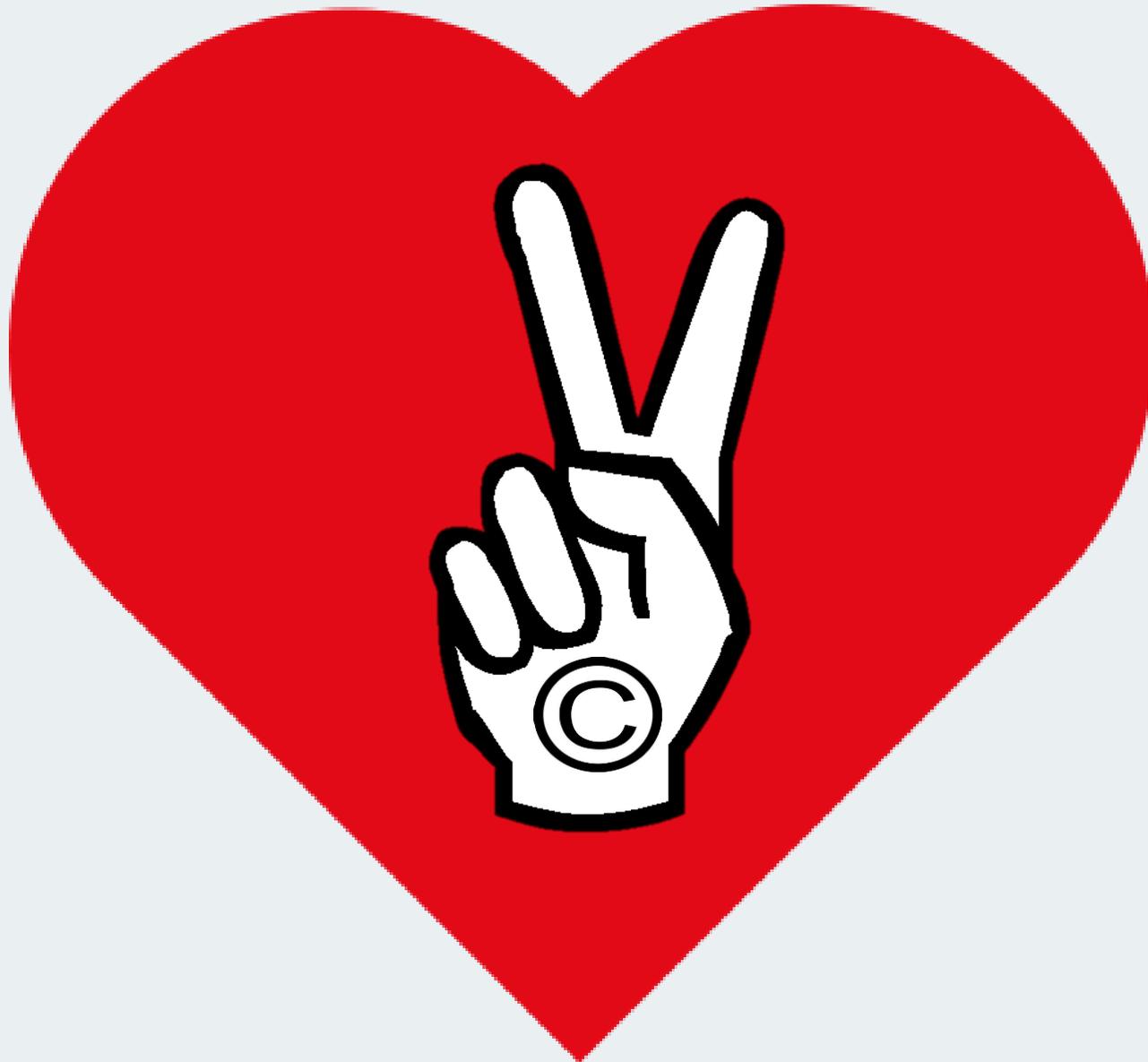
Entry into Force: 6 Months

- Short period for industry to adjust
- Most licences contain some type of clause providing for renegotiation or termination in the case of a material change of circumstances
- Such clauses provide the procedural space for determining means of verification or termination.
- Does such a clause would fall within the Article 3(1) ban on contractual clauses?



CONCLUSION

- **The Commission considers more drastic measures for the DSM**
- **The AV sector argues that territorial licensing is the basis upon which content is financed, produced and distributed**
- **There is a concern that only the largest platforms would emerge victorious. Less investment in local productions, reducing the quality and range of content available, in particular for minority languages and cultures.**
- **The Proposed Regulation focuses on portability, perhaps to provide the Commission with a quick win. It will nevertheless set an important precedent.**
- **The Commission maintains that a long-term vision of a single copyright code should not be relinquished even if this may seem inconceivable for now**



PEACE LOVE AND COPYRIGHT