

January 31, 2018

Copyright and Enforcement Directorate
Intellectual Property Office
4 Abbey Orchard Street
London SW1P 2HT
United Kingdom
via email: portability@ipo.gov.uk

RE: Consultation on the Enforcement of the European Union Portability Regulation

The Independent Film & Television Alliance® (“IFTA®”) is the trade association for the independent film and television industry worldwide and submits the following comments in response to the above referenced Consultation. Our nonprofit organization represents more than 135 member companies from 20 countries, consisting of independent¹ production and distribution companies, sales agents, television companies, and institutions engaged in film finance. IFTA has 21 member companies based in or with significant business operations in the United Kingdom², all of which are “rights holders in the works provided on online content services, including creators and licensees.”

Unlike the major U.S.-based studios, IFTA Members routinely negotiate directly with unaffiliated third-parties to license exclusive rights for distribution including Free TV, Catch Up TV, and other contractually authorized uses, in exchange for payment of an agreed upon license fee and royalties. Europe and in particular the UK, are key territories for which IFTA Members license content and such territorial exclusivity in all media/distribution channels is fundamental to production financing by providing an incentive for local distributors to invest at a pre-production stage and critical to ensuring these early investors to recoup their financial contribution.

IFTA Members will be impacted by the European Union’s Portability Regulation³ and any determination resulting from this Consultation. IFTA is a member of the UK’s all-industry Digital Single Market Working Group and we concur broadly with its own response to this consultation. We are also in alignment with the response by PACT, the UK’s film/TV producers’ organization, and call on IPO to carefully consider the independent producers’ perspective on the impact of the Regulation. We caution that any disruption to the ecology of this complex market would have a significant impact on UK producers, sales agents and exporters and their distributors. In order to minimize the negative impact on the financing of new content, the audio-visual industry advocated

¹ IFTA defines “independent” producers and distributors as those companies and individuals apart from the major studios that assume the majority (more than 50%) of the financial risk for production of a film or television program and control its exploitation in the majority of the world.

² Altitude Film Sales, Cornerstone Films Limited, Distant Horizon, Embankment Films Limited, Entertainment One, Film Finances, Inc., Fintage House, Freeway Entertainment Group, GFM Films, Goldcrest Films International, HanWay Films Ltd., Independent, Kew Media, Lionsgate, Metro International Entertainment Limited, Mister Smith Entertainment Limited, Pathé Films, Protagonist Pictures Limited, Reel One Entertainment, Studiocanal, and The Works.

³ Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

for a narrowly worded Portability Regulation that meets the stated goals of “portability” and contains appropriate safeguards in order to protect rights holders. These include mandatory subscriber verification, and access only for a “temporary” time when traveling in EU/EEA countries. These constraints are indispensable in order to protect rights holders against abuses of the Regulation and ensure the industry’s economic sustainability is not weakened. IFTA believes that any Government guidance must reflect the crucial connection between compliance with the safeguards of the Regulation and incentivizing rights holders to continue to provide content to online services.

IFTA’s comments on the enforcement of the Portability Regulation are framed with the knowledge that: (1) the UK is actively negotiating the terms of its exit from the Union, (2) the UK is also seeking to establish a comprehensive post-Brexit free trade agreement with the EU, with the possibility of including specific deals for certain sectors (e.g. financial services), (3) the “legal fiction” adopted in the Portability Regulation is not found in UK Law, and (4) the Regulation would not otherwise be compatible to the UK Copyright, Designs & Patents Act 1988 in that it may limit rights holders’ exclusive rights⁴ to arrange for the licensing of their intellectual property. While there is a possibility that the Regulation will be included in the UK’s Withdrawal Bill, its application post-Brexit would have to be the object of one – or several - reciprocal agreement(s) with the EU in order to be implemented.

IFTA believes that the UK legal and enforcement framework is very strong and that its protection of exclusive rights in copyrighted works anchors production investment in the UK. The flexibility and strength of the copyright licensing regime has allowed IFTA Members, many of whom are small to medium sized enterprises, to maintain the financial and licensing regimes which fund production while adapting to changes in market conditions and taking advantage of new business opportunities.

Consultation Questions

1. Legal Enforcement

Q. Has the Government identified the most appropriate means of legal enforcement?

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IFTA agrees that that the means of legal enforcement and enforcement bodies identified are necessary to enforce the Regulation on cross-border portability of online content services. We believe that the most appropriate method of enforcement will have minimal impact on commercial transactions between private parties and agree with the Government that compliance matters not in the “public interest” are better enforced through clear civil procedures and remedies. Infringement of copyright should be addressed through all rights and remedies stemming from Section 16(2) of the UK Copyright, Designs & Patents Act 1988⁵, specifically the ability of rights holders to bring an infringement action against the provider of online content if there is a failure to verify the subscriber’s Member State of residence or to ensure that the subscriber’s access is confined to the borders of the EU/EEA as specified in the Regulation.

⁴ UK Copyright, Designs & Patents Act 1988, Section 16 <https://www.legislation.gov.uk/ukpga/1988/48/section/16>

⁵ <https://www.legislation.gov.uk/ukpga/1988/48/section/16>

2. Assessment and review of the enforcement regulations

Q. Will this review provision be sufficient to allow the Government to effectively assess the proposed enforcement mechanisms?

The narrow scope of the EU Portability Regulation reflects the legitimate concerns of rights holders with this encroachment of their exclusive rights: namely, that the content solely be provided to subscribers whose Member State of residence has been verified and whose temporary presence outside the Member State of residence but within the European Union/EEA allows them to access the subscribed-for content. If properly contained to its purpose, it is expected that the Portability Regulation will not disrupt the economic relationships underpinning our industry.

The draft UK enforcement regulations include a clause (6) committing to review these regulations every five years. The purpose of the review will be to establish whether, and to what extent, the proposed enforcement regime has achieved its objectives, if it is still the best approach, whether it is still required, and if it can be improved to reduce burdens on business and its overall costs. IFTA believes that a five-year review is too long a period, especially in the evolving digital marketplace and considering that the production community will have continuing concerns regarding financing and investing in content during and after the UK exit from the Union. While the review period may have to be negotiated with the EU in the event that the Regulation is included in a comprehensive free trade deal, the earliest possible UK review ahead of the Commission's own review of the Portability Regulation (March 2021) will be advantageous to all stakeholders.

In issuing Guidance and when the time comes to review the Portability Regulation, IFTA would ask that the Government keep in mind that the impact assessment accompanying the draft EU Portability Regulation was not sufficiently comprehensive in that it disregarded the administrative and legal costs of mandatory inclusion of portability in licensing agreements as well as any potential loss of license fees (and of return on production investment) for the producer. The impact assessment did not reflect the increase in administrative and legal costs associated with the renegotiation of settled licenses due to the application of the "legal fiction", coordination of a multitude of licenses throughout Europe with national distributors, and the legal costs associated with contractual compliance such as verification of subscribers and for resolving commercial disputes caused by the application of the "legal fiction" to transactional contracts that often may apply the Law of a jurisdiction outside the UK and the Union.

3. Guidance on the EU Portability Regulation

The Government asks for views on what further guidance on the Portability Regulation should include and IFTA recommends that any Guidance include: (1) specific details on how rights holders will be able to know which paid services are providing portable use, (2) whether free service providers have opted in to the Portability Regulation and will provide online portability, (3) clear information about how to confirm that subscribers are verified pursuant to the regulation including that the use is temporarily outside the Member State of residence; and (4) any other information that will assist in assessment of compliance.

Government Guidance should also make clear that: (1) the Regulation mandates that the online content in the language provided to verified subscribers within the Member State of residence is

the content which is accessible by those subscribers in other Member States; (2) Rights holders may require that no access to content be permitted outside the EU/EEA and require the platform to ensure that access to content remain inside the EU/EEA; (3) While additional charges to subscribers are not allowed, the Portability Regulation is silent on the matter of the license fees *negotiated in good faith* between rights holders and service providers for portability of licensed content to subscribers, leaving open the prospect of an enhanced license fee appropriate for the now expanded licensed territory; and 4) services will not be responsible for the quality of the access/viewing experience while abroad.

Such transparent Guidance will allow IFTA to advise its Membership on the perimeters of enforcing verification of subscribers with distributors and sub distributors and assist rights holders in determining when they may pursue any claim of copyright infringement pursuant to the Copyright, Designs & Patents Act 1988, Section 16(2).

4. Geographical Scope

The UK enforcement regulations should ensure the geographical scope of the application of the Portability Regulation remains solely within the EU and EEA and no portability will occur outside those boundaries without the express authorization of the rights holder. Nothing in the UK enforcement provisions should broaden the scope of the Regulation or lessen any protection of rights.

5. Future relationship with the European Union

The Portability Regulation attempts to smooth over the differences in national laws and the complete disruption of tens of thousands of completed distribution agreements, by creating a “legal fiction” in Article 4 so that a service is deemed to have been provided, accessed and used in the subscriber’s Member State of residence, rather than in the Member State where they are temporarily present. After Brexit, the Portability Regulation cannot be applied to localize activities in a “Member State” (the underpinning of applying the ‘legal fiction’ found in the Regulation) without a specific reciprocal agreement between the UK and the EU that enables the continued application of the legal fiction. Without such an agreement, the UK will have a legal quandary in that subscribers from other Member States may not have access to online content upon entry to the UK and UK providers who will have invested in portability offers may have to withdraw them.

The draft UK enforcement regulations include a clause (6) committing the Secretary of State to review these regulations every five years so that it can be established whether, and to what extent, the proposed enforcement regime has achieved its objectives, if it is still the best approach, whether it is still required, and if it can be improved to reduce burdens on business and its overall costs. IFTA welcomes this review clause; however, we believe five years is too long since there would be significant copyright and other legal implications for the local and worldwide audio-visual industry and consumers if the obligations contained within the regulation are continued after the UK has left the European Union. Separately and more urgently, the Government intends to publish Guidance on the Portability Regulation in the coming months and IFTA believes that should be done before the Regulation comes into force so that the audio-visual industry can prepare accordingly.

We urge you to implement any necessary enforcement regulations as narrowly as possible and we ask for the shortest review period possible for the Portability Regulation enforcement provisions but no more than three years from the initial implementation. A shorter review period would be in the interests of rights holders and their distributors and subscribers.

We thank you for taking these comments into consideration and invite you to contact us if you require any further information. Thank you.

Sincerely,

A black rectangular redaction box covering the signature of Jean M. Prewitt.

Jean M. Prewitt
President & CEO