



## Competition Law Association

British Group of the  
Ligue Internationale du Droit de la Concurrence  
(International League for Competition Law)

[www.competitionlawassociation.org.uk](http://www.competitionlawassociation.org.uk)  
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### **CLA Lunchtime Meeting: 14 January 2016 EU Copyright Reforms and what they mean for the UK**

On the 14<sup>th</sup> January 2016, Arnold & Porter (UK) LLP hosted a Competition Law Association event where Robin Stout, Deputy Director of Copyright Policy at the Intellectual Property Office, discussed the proposed EU copyright reforms.

Mr Stout began his presentation with a brief overview of what copyright is and how it aims to protect creative works and incentivise investment in new creative content. In our increasingly digitalised world, the need to protect these rights grows ever more pertinent. However, regulators must ensure that they don't end up stifling the innovation and investment they are striving to protect.

To date, 10 EU Directives have harmonised certain aspects of the 28 national copyright laws within the EU. So far, the areas that have been aligned include: the concept of originality, categories of work, restricted acts and minimum term of protection. Despite the progress that has been made, significant gaps exist which continue to impede cross-border trade.

Mr Stout explained that when President Juncker set out his plan to establish a digital single market ("DSM") in 2014, his broad agenda included reviewing consumer rights, addressing postal services and revising VAT. On the 9<sup>th</sup> December 2015, the European Commission published a Communication setting out its plans to reform EU copyright law. This Communication was accompanied by a draft Directive on cross-border portability of content and expressed an intention to address the outstanding gaps in the current framework. Mr Stout explained that the proposed reforms centred around 4 pillars, which he went on to discuss in turn.

#### **Access to content**

The patchwork of national copyright laws currently means that multiple licences are often required by anyone wishing to establish a business in the EU, which may present a significant barrier to cross-border trade. This approach often leads to the situation where content is freely available in one Member State ("MS"), and inaccessible in another. The differing exceptions between Member States add extra complexity and, taken together, impede the freedom to provide services.

To begin addressing these issues, the Portability Regulation was proposed which will allow users to access their subscriptions whilst travelling around the EU. In its current form, the Regulation will allow temporary access to all paid subscriptions. There are hopes that it will extend to free services too. However this will require prior verification of the users and there is no current consensus of how this mechanism might work. Overall, the UK Government supports the Commission's objective and hopes that the Directive might be agreed this year, which would mean implementation in 2017.

In addition, the Commission has expressed its intention to amend the Satellite and Cable Directive. Mr Stout explained that this includes a 'country of origin' rule for satellite broadcasts which allows a broadcaster who is licensed in one MS to broadcast across the entire EU without requiring any additional permission. Mr Stout explained that the Commission is currently considering whether this should apply to online services too. Either way, it is hoped that these provisions will make it easier for



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services to launch, thereby increasing competition and providing a wider range of access across the EU. The proposal is expected to be published in Spring/Summer 2016.

### Exceptions

Currently, Member States have the option to include up to 20 defined exceptions to copyright in their national laws. These are contained in the InfoSoc Directive which was implemented in 2001. Any exception that a MS chooses to apply must pass the Berne 3 step test. Despite this, inconsistencies in different Member States' approaches have hampered the EU's efforts to achieve harmonisation. For instance, Mr Stout explained that laws surrounding parodies and data mining have been modernised in the UK, but other Member States have yet to update their laws in light of modern technology.

Mr Stout explained that the Commission is in the process of reviewing the available exceptions, and that any proposal will aim to improve cross border access and trade. The Commission has indicated that these proposals are forecast for discussion in Spring/Summer 2016. The Commission's main areas of interest include the following:

- The principle of 'freedom of panorama' which allows people to take photographs of buildings which, for copyright purposes is considered an artistic work, and is therefore officially 'illegal' in some Member States.
- Provided it is for a non-commercial purpose, the UK's data mining rules allow researchers to use information in order to analyse trends and increase knowledge. The importance of this exemption was highlighted by researchers who sought to investigate certain aspects of malaria, but in order to analyse the academic literature required prior consent. The EU is discussing whether the new proposals should include a similar provision.
- With the increase in popularity and dependence on distance learning, it is hoped that the proposals will address some of the uncertainty surrounding the use of educational materials in distance learning.
- It is thought that the new proposals might contain an exception which would allow libraries and archives to make copies of material for the purposes of preservation.
- The Marrakesh Treaty provides an exception to copyright rules by allowing the creation of accessible versions of books to be made available for the visually impaired. It is thought that the new proposals could include a similar provision or an obligation for its ratification.

### Fair marketplace and value chain

The third pillar of the reforms focusses on ensuring that the value in protected works is shared fairly and reflects the parties' contributions. Concerns have been raised about how large platforms are able to dictate the price paid to right holders for making their work available to the public. The Commission is also considering the status of hyperlinks, which are restricted under copyright in certain circumstances, and measures such as those currently in place in Germany and Spain which have aimed to force news platforms to pay a levy to publishing right holders for use of their work. The Commission is also reflecting on whether measures should be introduced to rectify distortions in the market which are anticompetitive and unfair to artists. This area appears less developed than others, but proposals may emerge in Summer 2016.



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### Enforcement

The final pillar of the reforms concerned enforcement which the IPO hopes will focus on improving the current options and will streamline the structure. Mr Stout explained that the IPO is supportive of the steps the Commission is taking.

Mr Stout concluded his presentation with a discussion of the ambitious timetables set by the Commission. In relation to the Portability Regulation, the Commission aims to reach an agreement by December 2016, which could mean implementation around May 2017. This would coincide with the timetable which has been set for roaming charges being phased out. Spring/Summer 2016 will see the publication of the second wave of proposals which could include revision of the Satellite and Cable Directive, copyright exceptions and the value chain. These negotiations could last until the end of 2017 and beyond. Mr Stout also forecast that enforcement proposals are expected towards the end of 2016, which again could mean that negotiations continue well into 2017.

Overall, the IPO and UK Government are supportive of the DSM and are keen to see the proposals come to fruition. Currently the IPO is in agreement with the basic outline and believes that the portability proposals are a good start. Mr Stout predicts that there will be a debate on the terminology used and foresees that the balance between the interests of right holders and service providers might be a hard one to strike. Additionally, the distinction between temporary/home residency will come under discussion.

The IPO will soon issue a 'call for views' which will be published on the Government website. This will provide the opportunity for people to express their opinions on the portability proposals and their key concepts. Helpful suggestions are welcomed and once these have been gathered, they will be considered by the UK Government. It is hoped that this collaborative approach will help to produce a new framework which will update the EU's copyright laws to be in line with the digital age.

**Please note:** "call for views", have now been published. Please go to:  
<https://www.gov.uk/government/publications/call-for-views-on-cross-border-portability-of-digital-services>