

# European Intellectual Property Review

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#### **The EU Portability Regulation: One Small Step for Cross-Border Access, One Giant Leap for Commission Copyright Policy? 321**

This article seeks to demonstrate that the newly proposed Portability Regulation, intended to permit access to online works legally available in one Member State when the user travels to another Member State, represents a cautious first step towards significant copyright reform in the EU. While there are some ambiguities in the proposal that require scrutiny, the Commission has nevertheless made its first concrete step towards addressing issues of territoriality in copyright law.

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Part 1 of this article discussed the historical development of the US exhaustion doctrine to the present. This Part 2 discusses a recent decision of the Federal Circuit that involves a complex licensing scheme with an unusual pattern that gives the scheme characteristics arguably bringing it into conflict with the exhaustion doctrine, on the one hand, but safely within the doctrine permitting the licensing of limited fields of use, on the other hand. The author suggests that the Federal Circuit's reasoning in reversing a grant of summary judgment against the scheme is not faithful to Supreme Court precedent, because it imposes an erroneous standing requirement on invoking the exhaustion doctrine and uses an unduly narrow standard to determine whether what is sold and what infringes the patent are sufficiently alike to trigger the exhaustion doctrine. Nonetheless, the court may have reached a correct result in the particular case: unresolved and unaddressed issues could be essential to determining the proper outcome, precluding summary judgment. In any event, for practical reasons, the Federal Circuit's new doctrine may greatly limit the future application of the exhaustion doctrine in several fields of new technology, particularly information technology. That may suggest a need to devise a new legal analysis to supplement the exhaustion doctrine. A form of equitable estoppel analysis, based on the underlying conceptions of the *British Leyland* case, is proposed to provide that supplement.

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On 9 December 2015, the European Commission published its Digital Single Market Strategy and, together with that, a proposed Regulation on Cross-Border Portability of Content Services. The proposed Regulation is intended to enable subscribers to content services to continue to access those services while temporarily abroad in another EU Member State. The article explores the language of the proposed Regulation and its potential impact.

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Wearable technology is going to change the way that we, as consumers, interact with clothes and accessories, and as the market develops we will see increasing collaboration between technology giants and fashion houses to design innovative products which target the tech-savvy yet fashion-conscious consumer. This article considers the intellectual property rights which businesses in the wearable technology space will need to consider. In particular we will explore how best to balance the protection of the technical aspects of wearable tech with the protection of aesthetic components, as well as addressing questions concerning ownership of rights within collaborative partnerships. It is clear that wearable technology is an expanding industry and that early consideration of intellectual property rights is key to the success of any given product.

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The article identifies the obstacles raised by geo-blocking in Europe and explains why the purpose of targeting culturally and linguistically diverse audiences and preserving remuneration opportunities associated with a particular territory may still justify the licensing of copyright works on a country-by-country basis. While reviewing several policy options and commenting on the recent proposal of the European Commission for a regulation ensuring the “cross-border portability” of online content services, the article argues that, for the logic of the “Digital Single Market” to progressively prevail, the conditions under which territorial restrictions and geo-blocking measures may still be regarded as legitimate under EU law should be urgently clarified.

**Comment**

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**A Likeness and Claims Post-Mortem: Ruling of the Warsaw Appeal Court 377**

In a ruling of 7 January 2015 the Warsaw Appeal Court stated that the heirs of the famous Polish actress Anna Przybylska could not accede to a court litigation case initiated during Anna Przybylska’s lifetime with the publisher of a widely read daily tabloid concerning a likeness known to the public of the actress, which was disseminated unlawfully.

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