
Towards a clash between copyright enforcement and portability: an underestimated challenge

*From data to content portability
and its interplay with Article 17 of
the Copyright Digital Single
Market Directive (CDSMD)*

Tackling the problem

- Portability: multiple functions, multiple definitions
- Evolved from a **data-specific** towards a **content-specific** regulatory instrument

Going in parallel with...

- Competition law and platform regulation...
...BUT carrying with it the risk of
overlap with
copyright enforcement tools?

Research question

As portability evolved from a data-specific
into a content regulation tool...

...can the EU copyright enforcement system
encroach its scope and hamper its
effectiveness?

Roadmap

- 1) From data to content portability: tackling the evolution of a multifaceted concept
- 2) Portability v IP: are digital contents a net of IPRs?
- 3) Art 17 of the Copyright Digital Single Market Directive: a copyright enforcement system setting duties and incentives — what interplay with portability?
 - Lack of effectiveness of portability rules?
 - Are gatekeepers incentivized to under-implement portability obligations?

From personal data portability...

Article 20 General Data Protection Regulation (GDPR)

- data transfer also among data controllers (indirect) for the benefit of data subjects
 - Submitted to the following conditions:
 - “without hindrance”
 - only by consent or contract
 - at least partially, through automated means
 - only personal data “provided” by the data subject — in line with data protection law
 - without affecting third parties and their prerogatives — **also including IPRs** — balance test case-by-case (Recital 63 GDPR)
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...to content portability...

Article 16 Digital Content Directive (DCD)

- At the request of the consumer, the trading platform shall make available content provided/created by him
 - Submitted to the following conditions:
 - context-specific — only towards the trader/counterparty
 - in any event the contract is terminated under negative/unforeseen circumstances
 - Termination shall occur for lack of conformity
 - **By way of contrast with Art 20 GDPR**
 - Also, non-personal data
 - No balance/prevalence rule for IPRs
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...to cross-border content portability...

Article 3 Portability Regulation

- Cross-border portability of paid subscription services in Member States of temporary residence of subscribers
 - **Peculiarities:**
 - content-specific — extendable to non-paid services (Art 4) on an optional basis
 - unclear reading of the notion of “temporary residence” — broad scope?
 - quality requirement — a binding duty to refrain from restrictions based on quality of services?
 - Art 7 — contrary clause unenforceable (Art 3 as requirement of objective conformity for the application of Article 16 DCD)
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...in between content portability and data access

Article 6 Digital Markets Act (DMA)

- **Article 6(6) DMA:** the gatekeeper shall not restrict ability to switch to different software application services
 - **Article 6(7) DMA:** the gatekeeper shall ensure access to and effective interoperability among operating systems, hardware and software applications
 - **Article 6(9) DMA:** gatekeepers shall provide end-users with **continuous and real-time access to data** provided/generated through use of core platform services
 - **Article 6(10) DMA:** gatekeepers shall provide business users with **continuous and real-time access to data** provided/generated through use of core platform services
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Portability v IP:

Data collections can fall within the definition of «database» under Article 1 of the Database Directive, eligible for sui generis or copyright protection

IPRs can be owned by

- the aggregator/controller/content provider
- third parties
- the (business) user

Does IP (enforcement) hinder the effectiveness of portability? Time to search for a balance?



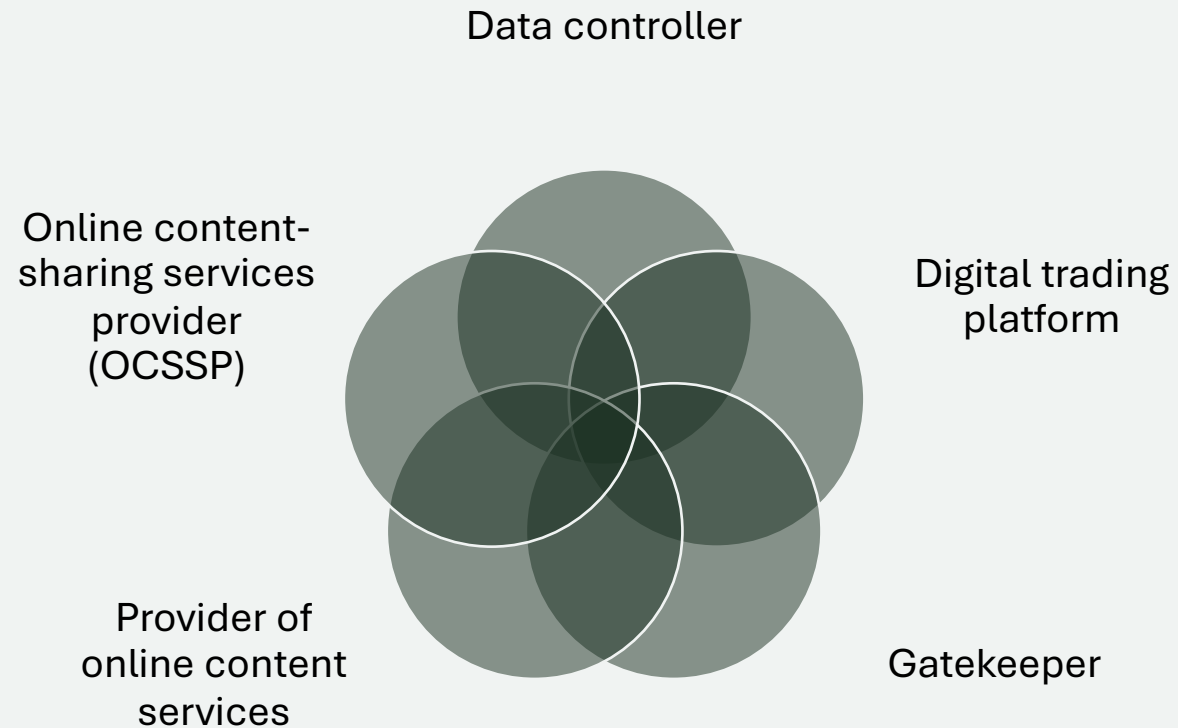
Article 17 of the Copyright Digital Single Market Directive (CDSMD) — IP enforcement v portability?



Article 17 CDSMD targets online content-sharing services providers (OCSSPs) (Art 2(6)) by setting a two-tiered liability regime:

- **Primary liability** (Art 17(1)) — what interplay with CJEU-reading of «communication to the public» under Art 3(1) InfoSoc?
 - communication to the public while trying to comply with portability obligations?
- **Secondary liability** (Art 17(3)(4))
 - ex-ante filtering and blocking measures (EC Guidance, 2021) of «manifestly infringing» and «earmarked» contents — encroachment in scope of portability rules?

An overlap of taxonomies leads to...



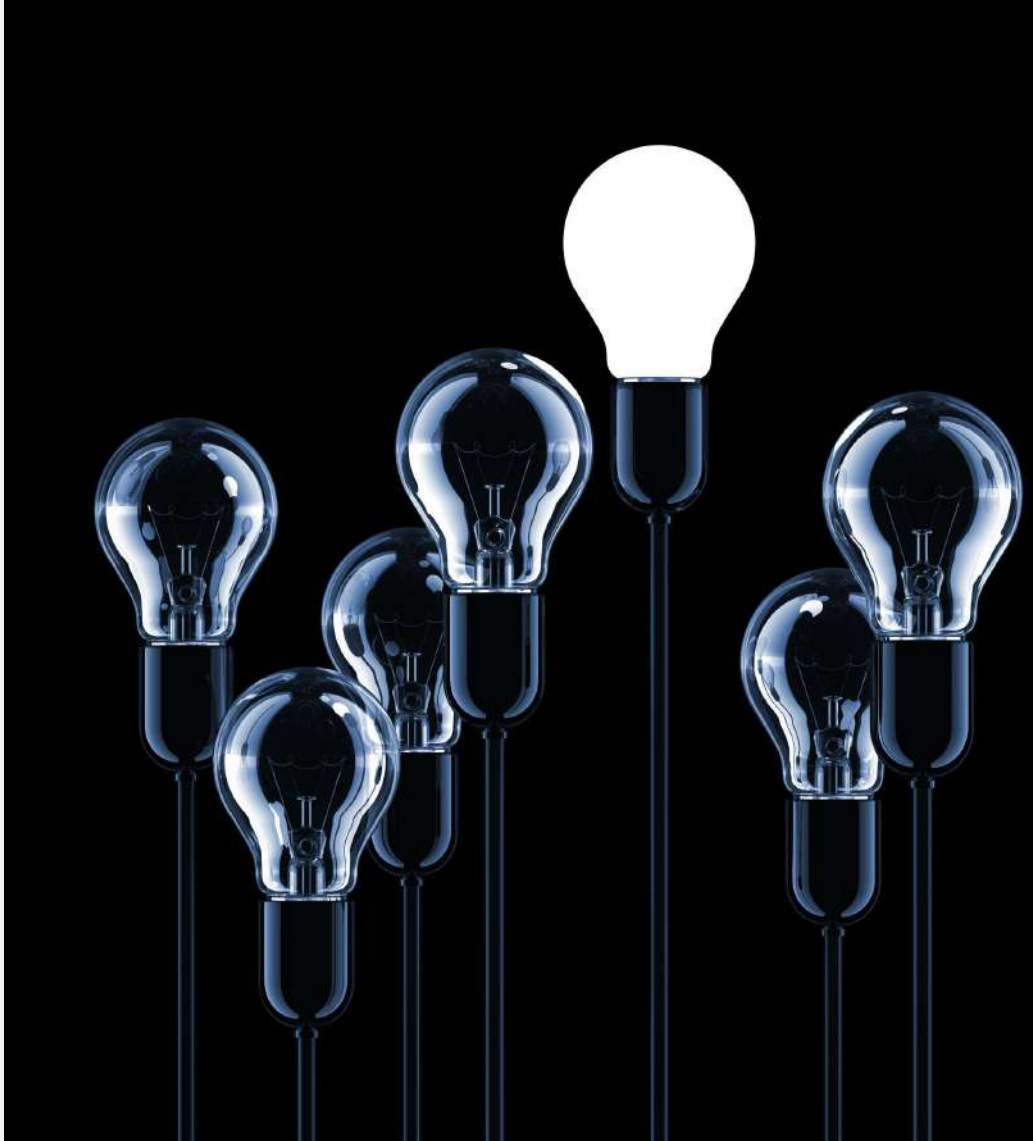
...a mutual reinforcement among portability rules?

Article	Article 20 GDPR
Article	Article 16 DCD
Article	Article 6 DMA
Article	Article 3 Portability Regulation

...a clash between the objectives of copyright enforcement and portability?

- Anti-competitive impact of ex-ante filtering/blocking measures v pro-competitive nature of portability
- Legal uncertainty as to the array of portable data and contents
 - reduction?
- Risk of conflation between primary and secondary liability under Art 17 CDSMD
 - under-implementation of portability obligations?





Thank you for your attention!

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