BSAC PROPOSALS – CONTRIBUTION TO THE BAZALGETTE REVIEW

PAPER B: "DEVELOPING INTELLECTUAL PROPERTY"

26 May 2017

This document provides a summary of BSAC's emerging proposals, which build on the themes set out in our response to the Industrial Strategy Green Paper, a copy of which was shared with the Bazalgette Review in April 2017. It is being submitted as a further contribution to the Bazalgette Review, following the request issued on 15 May for information by the end of May. BSAC will continue to develop its proposals as part of its contribution to securing a 'sector deal' for the Creative Industries.

The document covers one of the five key themes in the Bazalgette Review: "Developing Intellectual Property".

A separate BSAC paper covers the "Creative Clusters (including Talent)", "Exports" and "Accessing Investment and Research and Development" themes (BSAC's Working Groups did not specifically look at New Technology as a separate topic).

A. Importance of intellectual property rights, particularly copyright

Safeguard IPRS as critical to attract investment in the creative industries, and then gain a return on that investment, and better understand what parts of the IPR framework are most important to investors

1. BSAC's recent response to the Governments' Industrial Strategy Green Paper consultation[1] explained how the UK's Creative Industries represent a global success story in both economic and cultural terms. For example, in economic terms, they account for 5.3% of the UK economy (£87.4 billion Gross Value Added), generating £20 billion in exports and almost 2 million jobs. BSAC Members represent many of those in the value chain for audiovisual content, one of the crucial outputs from the creative industries. The audiovisual sector provides impressive economic benefits both in the UK and in terms of exports, but audiovisual content also has significant social and cultural value[2]. Our response to the Governments' Industrial Strategy Green Paper consultation provided examples of how audiovisual content is, moreover, a vital driver of soft power overseas. We also explained the unique economics of content creation and distribution, and in particular the nature of the risks and the cost structures relating to high-end content.

2. The current intellectual property rights (IPR) regime underpins this success. The ability to choose where, when and how the rights arising from copyright in audiovisual content are exercised is crucial to ensure there can continue to be the same levels of investment in the creation and distribution of the content that consumers enjoy. Although a range of IPRs can be relevant sometimes, copyright is the most important IPR for the audiovisual sector. Most of our comments are therefore about copyright. In this respect the current copyright framework is generally working well, but there are limited areas where helpful improvements to how it works could be made. There are also parts of the copyright framework that need to work as now after Brexit and various non-legislative issues which would enhance how the copyright framework underpins the successful audiovisual sector. All of these issues are important to the Industrial Strategy.

1 See BSAC response to the Government's Industrial Strategy Green Paper, 'Building Our Industrial Strategy' (17 April 2017), at http://www.bsac.uk.com/wp-content/uploads/2017/04/BSAC-Response-to-BEIS-Industrial-Strategy-Green-Paper-FINAL.pdf

2 As set out in our response to the Government's Industrial Strategy Green Paper, 'Building Our Industrial Strategy', as referenced in Footnote 1.

3. In taking forward any suggestions that we, or others, have made, it is crucial not to simply view the IPR framework as a form of regulation that seems unnecessary to some. Successful industries in the audiovisual and other creative sectors depend on IPRs. IPRs provide the mechanism that enables the creative industries to get a return on their investment. Without effective and enforceable IPRs in the UK there can be no such return and so little chance of attracting investors to the UK rather than countries that have more attractive IPR regimes. We do, however, believe that the current IPR regime in the UK is generally attractive to those considering investing in the creative industries in the UK. Any changes to the IPR framework must, therefore, build on this attractiveness and certainly not undermine it.

4. Although the perspective of investors and potential investors is therefore extremely important, we do not believe that there is currently any good analysis of how they view the UK IPR regime. In order to fully understand the importance of IPRs , which make people invest in the UK rather, than, say, other European countries, it would therefore seem sensible for the Government to consider commissioning a targeted analysis of what IPR provisions are attractive to investors. This type of research, would, as we have indicated, fill a gap in our current knowledge, but it should remain limited in scope and certainly not lead to a wide-ranging review of copyright[3]. We would be very happy to support, and, where possible, facilitate such an analysis.

3 See section B(ii), below, where we have rejected the need for such a review.

B. The copyright framework

(i) Establish a stakeholder forum to explore possible co-operation on the role of online services giving access to content uploaded by users

5. After a number of changes to copyright law in recent years, some initiated in the UK and others in the EU, we do not believe that it would be helpful to have another major review and overhaul in the near future. However, there could be an opportunity for the UK to take a lead regarding one of the areas covered by the current EU copyright package, which was published in September 2016. As we noted in our response to the Intellectual Property Office (IPO) on the draft Digital Single Market (DSM) copyright Directive in that package, Article 13 of that Directive raises a number of important and difficult issues[4]. We urged the IPO to not delay the establishment of a forum where stakeholders can explore possible co-operation on the role of online services giving access to content uploaded by users. This certainly does not need to wait until after the EU proposals that would require this are agreed, so, as we said previously, the IPO should establish a forum in the near future.

(ii) Do <u>not</u> undertake any major copyright reviews and resist introduction of a 'fair use' exception

6. As we have said, the current copyright framework is, however, generally robust, providing a fair balance between all stakeholders. It supports in an essential way how the creative industries can get a return on their investments and should not be viewed as yet another type of regulatory burden that those who wish to use creative content may prefer to have removed. Without IPRs, investing in content creation cannot lead to a return on that investment. Any lobbying seeking wide changes to copyright law should, therefore, be resisted. The evidence does not, in any case, suggest that there are any major problems with the copyright framework. In recent years the market has seen an explosion in choice for consumers, competition between the various players and new companies being established. Our current IPR regime is proactively supporting and clearly not inhibiting growth.

4 See BSAC's response to the IPO call for views on the Digital Single Market Copyright Proposals that were published by the EU Commission on 14 September 2016 (6 December 2016), at http://www.bsac.uk.com/wp-content/uploads/2016/12/BSAC-Response-EU-Sept-2016-Copyright-Package-FINAL.pdf

7. The need to resist any lobbying for a wide review of copyright includes any lobbying to expand the scope of UK exceptions to copyright, such as by the introduction of an exception like the US one of 'fair use'. The exception provision in UK law has been reviewed on more than one occasion in recent years[5] and a number of changes to exceptions were subsequently made. The UK tradition on exceptions to copyright is to provide a considerable number of exceptions, but then to define them in some detail so that they are directed at specific activity and are constrained by reasonably clear limits, which are consistent with the 3-step test set out under international and EU law. This approach should be maintained, and any flexibilities following Brexit or otherwise should certainly not be seen as an opportunity to insert yet another exception into UK law modelled on the US concept of 'fair use'. Such an exception does not provide certainty about what can be done (the scope of fair use has been defined by over 100 years of case law in the US, which is absent in the UK) and benefits most those who are able to fight any challenges in the courts. 'Fair use' would, moreover, only transfer value from one sector to another without resulting in any overall net gain to the UK economy, and could possibly lead to a net loss given the degree of harm that could result in the creative industries. Such an exception would be a major change to UK copyright law and not one where all the consequences can be readily worked out.

8. Neither the Government nor stakeholders in the value chain for audiovisual content, all facing the many issues that will necessarily need to be addressed in the next few years as a result of Brexit, will have the resources at the moment to thoroughly assemble and analyse all the evidence necessary to inform decisions on any major changes to copyright law. This is not the time for a quick review with a wide remit reporting in a few months' time and so with no chance of properly understanding the many complexities. It is unrealistic to expect stakeholders to concentrate on providing good evidence with the challenges of Brexit to deal with. Even if there is a concerted lobby from some to use Brexit to justify significant changes to the copyright framework, this should therefore be firmly opposed.

5 Such as by the Hargreaves Review of Intellectual Property and Growth, published in May 2011.

(iii) Maintain the benefits of current EU IPR provisions following Brexit

9. It is, however, absolutely essential that there is an ongoing, effective copyright regime in the UK following Brexit and much of UK law does, now, reflect provision in EU law. On many issues the UK can simply keep the UK law reflecting EU law without any problem. But, if the UK is no longer part of the EU or covered by an agreement with the EU to preserve the way the law works, there will be a problem for a number of issues. We have set some of these out in the Annex, including with some explanation of why they matter and what is needed.

10. The Government will need to consider and take into account the impact of Brexit on certain recent and forthcoming developments in the Commission's DSM initiative. One such example is the ability of subscribers to enjoy portable subscription services when temporarily visiting another Member State, which will be likely to start before Brexit, and questions will be raised about how this will continue following Brexit without any action by the Government. Although resolving this in terms of what it delivers may not be a core issue in the context of the UK's Industrial Strategy, failure to address this will result in uncertainty for industry and potentially unhelpful negative publicity about copyright from consumers, who may be frustrated by what they can no longer enjoy. This would not be helpful to the UK's image as a good place to invest because of a mature, effective and fair IPR system.

11. We have highlighted the issue of portability given that it is the most advanced of the DSM initiatives that will likely be in force prior to Brexit, but it is not necessarily the most important issue required to maintain the robust and fair copyright regime that the UK enjoys, and which is attractive to investors. For example, we have recently provided more information about the importance of the provisions in the Satellite and Cable Directive 1993[6]. It would not, therefore, be acceptable for the Government to dismiss or delay addressing many of the issues that we have identified in the Annex.

6 We have submitted some additional information to the IPO regarding how some BSAC Members benefit from the provisions in the Satellite and Cable Directive in response to a recent request from the IPO.

(iv) Counter threats from EU proposals and initiatives, especially those undermining exclusive territorial licences

12. We have already provided a number of detailed comments on the DSM copyright proposals published by the EU Commission in September 2016[7]. These proposals cover a number of issues, and we do not propose to go into all the details in this paper. But we do have some serious concerns, particularly on the proposed transmissions Regulation, including how it may work with other Commission initiatives, such as the pay-TV investigation and the e-commerce sector inquiry. The issues that we have raised are not resolved by the UK's decision to leave the EU because, even if the UK is not bound to adopt any of the EU legislation ultimately agreed, much UK audiovisual content is enjoyed in other EU Member States. How it can be made available there and what happens when it is made available in just one or some Member States will continue to have a significant impact on the UK audiovisual sector.

13. Our headline comment regarding the EU proposals and initiatives more generally is the same as for any possible proposals for change in the UK, namely that, after a number of reviews and revisions to the law in recent years, the current copyright regime in general strikes a fair balance between the needs of all stakeholders, including the audiovisual and technology sectors, and major changes are not needed. Major changes may even have serious unintended consequences.

14. We do, however, appreciate that some of the proposed changes for EU law match what is already possible in the UK. We have therefore indicated some support for a few of the changes proposed by the EU Commission, such as greater harmonisation of some of the copyright exceptions, although even on those we have highlighted some concerns about some of the detail. In general, however, the current copyright framework works well. As we have explained in our response to the IPO, some of the Commission's proposals pose a serious threat to how copyright may be licensed on a territorial basis. The ability to agree such deals is often essential to raising the finance to make the content.

7 See BSAC's response to the IPO call for views on the Digital Single Market Copyright Proposals, as referenced in Footnote 4.

15. We therefore urge the Government to act now as forcefully as it can to oppose the attack on territorial licensing in the Commission's proposals and initiatives. We believe that there are some other Member States, such as France, that are as concerned about the course of action the Commission is taking as we are. The UK should therefore work with such allies in the EU to challenge the most damaging proposals in the DSM package for as long as it can. The Government should not use Brexit as a reason to stand back from these important negotiations on EU law. It is important to remember that undermining territorial licensing would have a significant impact on the UK audiovisual sector even after Brexit when there are co-productions and when UK content is being licensed across Europe.

(v) Use the opportunities of Brexit to only copy EU copyright law changes that make sense for the UK

16. We do not, of course, yet know either the form of the changes likely to be eventually agreed following the various copyright measures proposed by the EU Commission last September, or whether the UK will be under any obligation to incorporate them into UK law. We do in general accept that there are benefits from ensuring that UK copyright law continues to work the same way as required by EU law. It may, therefore, be appropriate to update the law in line with the changes to the EU copyright rules that are currently in the pipeline even if this is not essential.

17. But, as we have explained, there are serious concerns with the proposals that threaten territorial licensing. Were the final form of the rules to be agreed without resolving these concerns, then Brexit would, of course, provide an opportunity <u>not</u> to copy them in the UK. This is not, however, our preferred course of action. Getting the best deal during the negotiations on this copyright package so that territorial licensing is not undermined should still be a priority for the UK.

C. Business awareness of IPRs

Improve the ways that SMEs and start-ups in the creative industries can obtain relevant information about IPRs, particularly copyright

18. Although the IPR framework might be generally working well, there are many small and new businesses that may not be sufficiently aware of its importance to them. They may not understand how copyright can work for them, how they should manage their rights, and when and how to get permission when using other people's material. Mechanisms that increase business awareness of IPRs are therefore crucial. We therefore welcome the fact that this is one of the goals recently set out in the Intellectual Property Office's (IPO's) corporate plan[8].

19. There are, of course, a number of organisations already active in raising awareness about IPRs as well as the IPO. However, given its lead on IPR policy generally, the way that the IPO works is crucial. We are concerned that the IPO may not always consider what is best to address the specific needs of the creative industries. It will be important for the IPO to make sure that businesses of this type are well-catered for as it rolls out the commitments set out in its latest corporate plan. Although the creative industries do need to have some understanding of registered IPRs, copyright is the key right and much of the IPO's focus on raising business awareness seems to **not** start from this premise. The IPO's approach to raising business awareness of IPRs may, therefore, be less useful to a small business starting up or expanding business activity in the audiovisual sector than is desirable.

20. We note that the Creative Industries Federation (CIF) has recently pinpointed the need for better understanding of IPRs for SMEs by proposing a 'business booster' network[9]. The best approach might therefore be for the Government to work more with other organisations already involved in raising business awareness about IPRs in the creative industry sector, and with organisations with interesting proposals for how this might be done better, such as CIF. A starting point might be to get the relevant organisations together to map out a way forward to improve business awareness of IPRs in the creative industries. It may be that the Government can facilitate access to the right information at the right time, whether or not it is the Government's information or that of another trusted stakeholder, perhaps through a portal that is specifically focused on the needs of the creative industries

8 See pages 30 to 35 of the IPO Corporate Plan 2017-2020, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/607989/IPO-Corporate-Plan-2017-2020.pdf

9 See pages 3 and 11 of the CIF response of April 2017 to the Government's consultation on 'Building our Industrial Strategy' (April 2017), at http://www.creativeindustriesfederation.com/assets/userfiles/files/WEBSITE%202_%20Blueprint%20for%20growth.pdf

D. IPR enforcement

Make the UK a world leader in its response to copyright piracy, including by filling any gaps in criminal sanctions applying to illicit streaming of audiovisual content

21. Effective enforcement of IPRs, particularly copyright, is essential if illegal activity is to be prevented from undermining the success of all the businesses involved in production and distribution of creative content in the UK and around the world. Copyright piracy in various forms is an ongoing threat to the audiovisual sector. Industry has over the years responded to the way consumers wish to enjoy audiovisual content by developing new, legal business models, with delivery of content via the internet to a wide range of devices via different business models (i.e. transactional, rental, subscription) increasingly replacing older business models using physical copies and other forms of distribution. However, traditional forms of copyright piracy are still an issue. But the ease of copying and distributing audiovisual material illegally over the internet has significantly expanded the opportunities for those intent on undermining the significant investment by the industry which supports production of the high quality content that consumers continue to enjoy. Those who engage in such illegal activity for profit have no regard for the interests of right holders, or consumers who will get less high quality content if the illegal activity significantly undermines the possibility of getting a return on the investment in making it. Copyright piracy, therefore, continues to be a serious problem that is only likely to get worse without prompt and effective action.

22. Copyright piracy does, of course, easily cross borders and so we welcome collaboration with other countries to find better solutions than might be possible in the UK alone. Action at EU level to address the problem by harmonisation of remedies and practical collaboration is, therefore, useful, but we are concerned about the time it is taking for the EU Commission to bring forward new proposals. The EU Commission consulted on an evaluation and modernisation of the legal framework for the enforcement of intellectual property rights between December 2015 and April 2016, but so far there does not appear to be any action as a result of this. We note that the IPO responded to this EU consultation[10] with the opening comment that:

> *'with the rise in popularity of the internet as a means to consume copyright content, and as a platform for commerce as well as a source of infringement, it is important that enforcement mechanisms and the broader legal framework are continually scrutinised to ensure their effectiveness.'*

This is a comment that we fully support. We hope very much that, even in the changed circumstances after the vote to leave the EU, the UK will continue to try and influence the Commission, and other Member States, to deliver improvements to the IPR enforcement framework at EU level. Even if the UK is not part of the EU, it is still crucial for many of our Members that there is effective enforcement against copyright piracy across the EU where many consumers will continue to enjoy audiovisual content having its origin in the UK and so be tempted by pirate offerings of this content where there are not effective means to act against that.

23. EU action to better deal with copyright piracy is therefore important, but, as we have said, nothing seems to be happening fast. The UK, does not, however, need to wait for the EU Commission to bring forward proposals in order to be able to do anything in the UK. This is true both with and without Brexit. For example, the IPO has recently consulted on the issue of illicit IPTV streaming devices and services. We provided a response to this consultation outlining the importance of acting as soon as possible on this very damaging activity[11]. Illicit streams of audiovisual content undermine the mechanism by which the content is normally directly or indirectly paid for, whether that is by payment of a subscription to access legal streams, only being able to access legal streams accompanied by advertising, or otherwise.

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10 See the IPO response, 'UK Government response to EU public consultation on the evaluation of the legal framework for the enforcement of intellectual property rights' (28 September 2016), at https://www.gov.uk/government/news/eu-consultation-on-the-enforcement-of-ip-rights

11 See the BSAC response to IPO Call for Views on Illicit IPTV Streaming Devices (4 April 2017), at http://www.bsac.uk.com/wp-content/uploads/2017/04/BSAC-IPO-IPTV-Piracy-Consultation-2017-FINAL.pdf

24. We welcome the fact that the UK is taking a lead on this issue, as reinforced by the IPO's recent recognition of the importance of a coordinated response to illicit streaming[12]. We hope very much that addressing gaps in criminal remedies, or difficulties with using existing criminal remedies, to prosecute those who sell and distribute such devices and services is a priority for whatever government is in power after the General Election in June. We welcome the very recent decision of the CJEU on the 'Filmspeler' case[13] that a person who sells such devices is communicating the audiovisual content to the public and so is infringing copyright when doing so without any copyright licences. However, it is important to ensure that criminal sanctions also clearly capture this activity. In this respect, it will be essential to make sure that criminal sanctions are not avoided by a person who sells legal IPTV devices and also guides consumers to where they can then easily download the illegal apps onto those devices (or indeed directly on to any device, such as a smart TV) that give access to the illegal streams. A person supplying illegal apps for loading by consumers, knowing that in doing so they are facilitating access to illegal streams by the consumers, must also come within the scope of clear criminal sanctions.

25. As well as ensuring that the appropriate criminal provisions are in place, it is also vital for law enforcement bodies to have the resources required to enforce those provisions. To this end, whilst we welcome the Government's continued funding of the Police Intellectual Property Crime Unit (PIPCU[14]), we would strongly request an increase in that funding to allow PIPCU to meet the challenges it is facing across all IP crime, in particular the threat of illicit streaming devices. For the same reasons we would request that Trading Standards bodies are provided with the resource required to address this issue.

12 As indicated on page 28 of the IPO Corporate Plan 2017-2020, as referenced in Footnote 8.

13 See the CJEU Press Release No 40/17 : Judgment in Case C-527/15, 'The sale of a multimedia player which enables films that are available illegally on the internet to be viewed easily and for free on a television screen could constitute an infringement of copyright' (26 April 2017), at http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-04/cp170040en.pdf

14 For more information about PIPCU, see their website, at https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/About-PIPCU.aspx

26. Criminal sanctions are not, of course, the only response to deal with any type of copyright piracy. We do support a multi-pronged approach where, as well as effective enforcement using appropriate criminal and, when helpful, civil remedies, all stakeholders play their part in acting in other ways. As we have explained in our response to the consultation on IPTV piracy, raising consumer awareness must remain a key element of effective action against copyright piracy. In this respect, the Industry Trust for IP Awareness[15] continues to be very active in developing effective approaches to better educate consumers about the importance of watching audiovisual material obtained from legitimate sources. The audiovisual industry is also a key stakeholder in the GetItRight awareness campaign[16]. In addition, the audiovisual sector continues to explore and use technical solutions and develop better ways of collaborating with technology companies where that is helpful.

27. However, industry cannot address all the challenges of copyright piracy alone and so looks to the Government to provide assistance and backing on both legislative and non-legislative issues. As we have said, even while the UK is still part of the EU and against the backdrop of action, or, rather, current inaction, at EU level on IPR enforcement, the UK could take a lead on making improvements for the UK. Ensuring that the framework for enforcement of IPRs works well for all types of copyright piracy is essential. Brexit may be an opportunity to make the UK the world leader in how it deals with copyright piracy via a multi-pronged approach with all stakeholders playing their part. We urge the UK to explore further improvements with stakeholders. We therefore welcome the IPO's recent call for bids to research into the effectiveness of the UK's enforcement framework for IP rights[17], but hope that this does not in practice lead to delays in exploring with stakeholders what more might be done. An important part of the Industrial Strategy will be to ensure that the UK is at the forefront of the global action that is needed to better address copyright piracy, and this would be greatly facilitated by ensuring that enforcement in the UK is the best it can be.

15 For more information about the Industry Trust and its activities, see their website, at http://www.industrytrust.co.uk/

16 For more information about the GetItRight Campaign, see their website, at https://www.getitrightfromagenuinesite.org/

17 As indicated in the IPO blog, 'Reviewing the UK's IP enforcement framework' (4 April 2017), at https://ipo.blog.gov.uk/2017/04/04/reviewing-the-uks-ip-enforcement-framework/

E. Other opportunities

Expand the UK's global influence on IPR issues underpinned by strong and enforceable IPRs in the UK

28. With an effective IPR regime in the UK and a willingness to ensure that rights can be properly enforced, the UK will be in a good place to take action to build on its already high standing in the world regarding respect for IPRs. The opportunities to do this will be increased following Brexit. With more freedom to influence the debate globally on copyright and other IP policy issues, the UK should, for example, be prepared to use its new relationship with other countries to increase the effect it can exert in international fora such as the World Intellectual Property Organisation.

29. Making the most of any opportunities to work with other countries outside the EU to address copyright piracy issues will also be important. Any free trade agreements should, for example, include provisions about action that signatories are expected to take to address copyright piracy. As well as ensuring that any free trade agreements that the UK reaches with other countries require proper respect for IPRs and effective enforcement against copyright piracy, there may also be opportunities for the UK to work with other countries that already share these values on how those values might be better understood and taken on board in third countries.

30. We welcome the work that the UK has already undertaken to establish IP attachés in countries that are, or might be, key markets. This can certainly increase the UK's influence in other countries to encourage better protection for the valuable content that the UK's creative industries produce and so facilitate its legal distribution in new markets. IP attachés can also provide valuable information about the IPR framework in potential new markets and so the Government should build on this work and roll out this sort of activity in more countries where there might be markets for UK creative content.

31. These opportunities are likely to be most effective if the UK is able to demonstrate its continued commitment to ensuring that enforcement of rights is effective, particularly to deal with new forms of copyright piracy, as we have indicated above. Showing that the UK is willing to act fast to update the legal framework and facilitate effective enforcement by other means as the nature of piracy changes will be essential.

For more information about BSAC
Please see our website
www.bsac.uk.com

ANNEX

Essential issues to deal with as a result of Brexit

Although much of the relevant EU law is provided by EU Directives rather than EU Regulations, and so there is UK law implementing them, there are still a number of issues where the UK must do something to ensure continuity or sense in the law following Brexit. We have indicated a number of these below, and where relevant what type of provision should be made. There are, moreover, some issues where EU Regulations are relevant and, of course, these would simply fall away in the UK after Brexit unless the UK makes provision in UK law. On a number of issues, we have indicated that there is a need for an agreement with the EU under which EU Member States continue to treat the UK in the same way as now, and vice versa. These are issues where the UK alone cannot make provision that would deliver the same outcomes as now and where those outcomes are important or essential.

Portability of digital content services

As the EU Regulation that would mandate cross-border portability of certain digital content services seems to be close to adoption, UK service providers will be required to comply with its requirements before Brexit. This includes some BSAC Members and they are already investing in changes to services to ensure that the cross-border portability that will be required can be delivered[18]. Indeed, the expectation that cross-border portability will have to be delivered before Brexit means that investment in some other improvements for consumers are currently being delayed. The Government needs to address what will happen to this legal mechanism in order to take into account the interests of UK consumers as well as those of stakeholders that are currently investing in delivering portability. If the consumer benefits of portability are to continue post-Brexit, then it will be necessary for the UK to be treated in the same way as now by EU Member States so that the provisions about copyright licensing apply to UK services that consumers wish to enjoy while in other Member States.

18 Although we were initially sceptical of the need for this Regulation in order to provide cross-border portability, we do now accept that the type of provision that will flow from the Regulation; that is, cross-border portability for all, and not just some of the content of a service and access in any and not just some Member States, would have been impossible to deliver without the Regulation.

Country of origin rule in the 1993 Satellite and Cable (SatCab) Directive

At the moment, the rule in the SatCab Directive, which means a communication to the public by satellite occurs solely in the Member State of origin of the signal, applies where the country of origin is the UK because it the UK is an EU Member State. After Brexit, although there could continue to be such a rule in UK law, there would be no mechanism to ensure that this would be respected by EU Member States unless there was an agreement with the EU on this. Without such an agreement, UK broadcasters would have to clear communication to the public rights in all Member States in which their satellite broadcast is available. The current rule is important to some BSAC Members and so such an agreement under which the UK continues to be treated the same way as a Member State would be essential to avoid problems after Brexit.

Cable retransmission rule in the SatCab Directive

The cable retransmission rule in the SatCab Directive is also important to some BSAC Members. For example, the rule leads to royalty payments to the UK production sector where broadcasts are re-transmitted by cable in another Member State. The rule is less important regarding what happens in the UK, where cable retransmission is not so common, but it will be important to ensure that royalties are still paid to UK stakeholders after Brexit where there are retransmissions of broadcasts having their origin in the UK in an EU Member State. The current rules in the Directive would not deliver this as the rule only applies to programmes from other Member States that are retransmitted by cable. An agreement with the EU is therefore also important for this aspect of the SatCab Directive to ensure that the UK continues to be treated the same way as a Member State.

Exhaustion of rights

The current provision in UK copyright law will need to be addressed as a result of Brexit as the UK will not be part of the EEA and so the distribution right should not be linked to actions happening in a place which does not even include the UK. The right directed at distribution of physical copies is, of course, less important than in the past now that much audiovisual content is delivered by other means. But a provision that makes sense may still be important sometimes. It is sometimes important to be able to prevent imports of things that unfairly undercut prices charged in the EEA/UK. This is one of the issues where there should be no rush to consider changes to the existing rule without fully understanding the consequences.

Customs enforcement of IPRs

The 2013 EU Regulation concerning customs enforcement of IPRs is still important even though much audiovisual content is made available online, including illegally. The EU Regulation is beneficial regarding the collaboration between Member States in the EU customs union. It will be essential for the UK to ensure that UK customs can continue to take effective action to enforce IPRs following Brexit, but, in order to keep the useful aspects of collaboration with EU Member States, this would require the UK to reach an agreement with the EU. This issue is, of course, of interest to right holders in many sectors in the UK and so it will be important for the UK to consult widely in order to establish what is needed as soon as possible. One important part of the current EU Regulation for the audiovisual sector is its application to devices, etc. that enable or facilitate the circumvention of technical protection measures. It will be essential to ensure that action that can be taken in the future is as effective as now.

Orphan works

BSAC supported action to make it easier to use orphan works a number of years ago[19] and is pleased that there has subsequently been legislative intervention both at UK and EU level. We would be concerned if Brexit led to a return to difficulties that no longer apply. The provision that just applies in the UK that facilitates use of orphan works would not, of course, be affected by Brexit. But the provision giving effect to the EU Directive on orphan works is also useful in some circumstances as it enables legal use of an orphan work in all Member States and not just the UK. Regarding orphan audiovisual works, the British Film Institute (BFI) has made use of the provisions in the Directive and would find it considerably more difficult to do certain things if the Directive no longer works as now for the UK. It is therefore important that the Government ensures that this is not the case. The provision that provides for mutual recognition in one Member State of orphans from another Member State will, we assume, require the UK to secure an agreement with the EU that provides for the UK to continue to be treated in the same way as a Member State if this Directive is to continue to work for UK stakeholders as it does now.

19 See for example BSAC, 'Orphan Works And Orphan Rights' (11 July 2011), which was prepared by a BSAC working group, at http://www.bsac.uk.com/wp-content/uploads/2016/02/orphan_works_report.pdf

Publication right

This is an issue that could in the future be important to the BFI. Although there may currently be no possibility of publication right in the UK for a long time and so no urgency to address this issue, the provision made in the UK will need to be changed in order to make sense after Brexit as, at the moment, publication right applies if the first publication after copyright has expired is in the EEA and the publisher is an EEA national. We believe, moreover, that the rules in the EU term Directive from which this right arises means that, after Brexit, there will be no publication right in EU Member States for material first published in the UK by UK stakeholders after copyright has expired unless the UK reaches an agreement with the EU for the relevant provisions to continue to apply with the UK treated as a Member State.

Collective rights management Directive

The audiovisual sector is affected by the provisions of the collective rights management Directive mostly when collective licensing is the option for clearing rights in content that may be used in or with audiovisual content. This Directive required more consistency between the ways collective management organisations operate in different Member States and it will be important to ensure that this continues to be the case after Brexit. The provisions in the Directive on multi-territory licensing of online rights in musical works by collective management organisations may also be beneficial to the audiovisual sector in some circumstances and so should also preferably be kept working as they do now.

Draft Digital Single Market copyright Directive

We have indicated elsewhere that there are a number of problems with the provisions in the Digital Single Market copyright package that was published by the EU Commission in September last year. There are, however, a few provisions in the draft copyright Directive which we generally support. For example, in our response to the IPO's call for views on this copyright package, we indicated that facilitating licensing of out-of-commerce works held in archives and possible cross-border use is helpful, so long as the licensing is subject to reasonable safeguards and forum-shopping cannot undermine those safeguards[20]. The benefits of this provision (if it provides for cross-border uses in a reasonable way and so should be adopted) would not, however, be possible to replicate in UK law alone. That would need an agreement with the EU to continue to treat the UK as an EU Member State for this purpose.

20 See BSAC's comments on Article 7 to 9 of the draft DSM copyright Directive, provided in response to the IPO call for views on the Digital Single Market Copyright Proposals, as referenced in Footnote 4.

Database right

Database right could continue to be provided in the UK after Brexit, but there would need to be some modifications in order for it to make sense, for example because of the references to the EEA regarding qualification for database right. There would also need to be an agreement with the EU if databases having their origin in the UK are to continue to attract rights in EU Member States. It would in our view be difficult to justify the continued protection in the UK of databases having their origin in the EEA if this is not reciprocated after Brexit for databases having their origin in the UK. This issue is not the most important one for BSAC Members, but there are some circumstances where the issue of database right can be important.

EU trade marks

EU trade marks can be important to stakeholders in the audiovisual sector. Although the issue of what status such marks have in the UK after Brexit may be somewhat less important than for some other sectors, we certainly support the need to provide a solution for those who have such marks at the moment regarding the status of rights in the UK. An ideal scenario would be for EU trade marks to apply in the UK under the same provisions of EU law as now. In this respect, we note that the Government has continued to pursue action in order for European unitary patents to be possible from the end of this year or early next year. If this is being done on the basis that the UK will be seeking an agreement with the relevant EU Member States in order for such patents to continue to have effect in the UK after Brexit, then there is no reason not to try and secure the same solution for EU trade marks.