



British Screen Advisory Council

'Bringing the audiovisual industries together'



Submission to:

**IPO consultation on 'Cross-border
Portability of Online Content
Services'**

31 January 2018

Introduction

1. The British Screen Advisory Council (BSAC) is an independent, industry-funded umbrella group bringing together many of the most influential people working across the value chain in the UK audiovisual industry, including television, film, video games and new digital media businesses. BSAC Members include not only all of the segments in the UK audiovisual value chain (including development, production, sales, acquisition and licensing of content), but also leading technology firms and Internet Service Providers (ISPs)¹.
2. We welcome the consultation on cross-border portability of online content services. Regulation 2017/1128 of the European Parliament and of the Council on cross-border portability of online content services in the internal market (the Portability Regulation) is a legislative change that the audio-visual sector fully supports as it facilitates access to film and TV content that consumers have subscribed to in their home country while they are travelling temporarily in another EU Member State. We are very much in favour of these consumer benefits flowing from the Portability Regulation.
3. Although the consultation is primarily directed at enforcement of the Portability Regulation in the UK, we are pleased that the implications of Brexit and the content of guidance that the IPO is to make available are also raised in the consultation document. These issues are linked and so should not be considered in isolation for the reasons we indicate below. In our view the best outcome would be for the Portability Regulation to continue to function as now after Brexit for the benefit of all stakeholders, including consumers. We would be happy to make experts from members of BSAC available to the relevant people in Government to help develop such an outcome.

Brexit

4. In our recent response to the IPO consultation on the Industrial Strategy, we highlighted the importance of dealing with copyright issues that arise in the context of Brexit as seriously as those concerning registered rights². One of the examples we gave is the need to ensure that there is an agreement so that the consumer benefits of cross-border portability of digital content services can continue after Brexit. The future application of the Portability Regulation was also the first item we listed in the Annex about essential Brexit issues in our paper last year to the Bazalgette Review³. We are very much in favour of the UK reaching an agreement with the EU so that service providers can continue to supply cross-border portability as enabled by the Portability Regulation after Brexit.

1 For a full copy of BSAC's Membership list, see our website, at <http://www.bsac.uk.com/membership>

2 See Paragraph 6 of the BSAC response to the IPO Call for Views, 'Industrial Strategy: Intellectual Property Call for Views' (15 November 2017), at <http://www.bsac.uk.com/wp-content/uploads/2017/11/BSAC-Response-to-IPO-Consultation-Industrial-Strategy-IP-Call-for-Views-FINAL.pdf>

3 See the Annex of the BSAC paper, 'Contribution to the Bazalgette Review: Paper B: "Developing Intellectual Property"' (26 May 2017), at <http://www.bsac.uk.com/wp-content/uploads/2017/05/BSAC-Bazalgette-Review-Paper-B-FINAL.pdf>

5. How the Portability Regulation works and so what impact Brexit will have if there is no such agreement is, however, probably not widely understood. We are concerned that in general very few people probably know that it is not always possible to simply copy EU law into UK law, possibly with some adjustments to UK law, in order for all the benefits of EU law to apply in the UK. The Portability Regulation would, of course, be in this category. As the consultation document quite rightly points out, one of the essential parts of the Portability Regulation is the 'legal fiction' provided by Article 4 of the Regulation. The provision on where a service is deemed to have been provided, accessed and used, that is the subscriber's home Member State rather than in the Member State where they are temporarily present, cannot work to remove any copyright and other obstacles to the delivery of cross-border portability of services for UK subscribers unless the UK is treated as now in the relevant laws of EU⁴ Member States. The continuation of cross-border portability after Brexit depends on appropriate provision in both UK law and the laws of all EU Member States that continues the 'legal fiction'. We assume that could only be guaranteed if the UK reaches an agreement that covers the issue with the EU. If there is no such agreement, it would not in any way be reasonable for UK law to continue to apply the obligations in the Portability Regulation on service providers in the UK who cannot then rely on the 'legal fiction' to deliver what is required. Without an agreement, the Portability Regulation should no longer be part of the law in force in the UK.
6. As the Portability Regulation will now enter into force on 1 April, we do understand that the obligations in the Regulation must, of course, be complied with soon. BSAC Members who are impacted by this are, therefore, changing services to ensure that the cross-border portability that will be required can be delivered. Given the investment that has been made in ensuring that services will comply with the cross-border portability obligations, it would be particularly unfortunate if the consumer benefits of the Portability Regulation do not continue after Brexit. Seamless continuity of the important benefits for consumers flowing from the Portability Regulation is therefore something that we very much support.
7. Service providers, as respecters of IP rights and other regulatory obligations, cannot, however, be expected to continue to provide cross-border portability of services after Brexit in the absence of continuity of the 'legal fiction'. Regarding copyright licensing, it is totally unrealistic to expect licensing agreements to be negotiated and concluded for all the content in all the services covered by the Regulation, and for cross-border portability to all EU Member States to be possible. In order to re-construct the 'legal fiction' by contract regarding copyright licensing, not only would the licensors of rights have to authorise the UK licensees to distribute outside of their territories, but they would also need to ensure that they have carved the relevant reservation out of each exclusive licence in every other EU territory. This would be expecting licensors to deliver something enormously complex and is not realistically achievable. It would, moreover, be particularly difficult to try and reach agreements with EU right owners on this issue when they

⁴ The laws in EEA countries that are not EU Member States would also need to treat the UK as in the Portability Regulation for cross-border portability of services for UK subscribers visiting those countries.

will, of course, continue to be covered by the Portability Regulation for cross-border portability between EU Member States and so would probably not consider dealing with the issue just for the UK a priority. Even if it were practically possible, which we maintain it is not, trying to establish licensing agreements is also not without costs for UK service providers⁵ and so it would certainly be extremely helpful to know what the Government's plans are regarding the Portability Regulation and Brexit as soon as possible.

8. Moreover, even if the rights position solved by the 'legal fiction' could be recreated by a network of contracts (which we do not believe is remotely practicable), this does not give the service provider any comfort about other legal risks in other territories⁶. For example, material may have been included in a programme that is treated as defamatory or a breach of privacy in (say) France, or that shows Nazi logos, which are prohibited in Germany. Protection for service providers for non-IP regulatory issues, including regarding regulation of audiovisual content and provision on consumer redress and jurisdiction, also needs to continue as now after Brexit. Protection from risks concerning non-IP regulatory issues cannot be recreated by contract.
9. The Government therefore urgently needs to address what will happen to the 'legal fiction' in the Portability Regulation as a result of Brexit. It would be most helpful if the Government's intentions on this issue are made clear before the Portability Regulation comes into force. It will, moreover, be important that any announcements made about the coming into force of the Portability Regulation make it clear to consumers in particular how Brexit may mean that what it delivers may not last beyond Brexit. And if there is no agreement continuing the application of the 'legal fiction' after Brexit, then there should be no obligations in UK law requiring the provision of cross-border portable services. Some content in some services may continue to be provided on a cross-border portable basis but this should then be an option for service providers to provide where they are able to do so (considering rights, other legal constraints, and commercial and technical feasibility) rather than a legal requirement if the UK is not treated as now in the laws of EU Member States.

Guidance

10. With the entry into force of the Portability Regulation less than a year before the expected date of Brexit, the Government should ensure that the guidance it makes available indicates very clearly that the benefits of the Regulation may not continue after Brexit. As indicated above, without any agreement between the UK and the EU that continues the application of the 'legal fiction' after Brexit, it would be impossible to deliver and ensure cross-border portability for all, and not just some

⁵ This would be extremely challenging for smaller UK platforms in particular; for example, the BFI Player.

⁶ There is, of course, an overlap with the Country of Origin principle in the Audiovisual Media Services Directive (AVMS Directive) regarding protection against such legal risks. We have previously indicated that the benefits of the AVMS Directive should also continue after Brexit – see, for example, point (ii) on page 14 of the BSAC paper 'Recommendations to Government on the UK'S new arrangements with Europe' (21 October 2016) at <http://www.bsac.uk.com/wp-content/uploads/2016/10/BSAC-Recommendations-to-Government-on-Brexit-FINAL.pdf>, where we explain the need to maintain the benefits provided by the AVMS Directive.

of, the content of a service and access in any, and not just some, EU Member States. The 'legal fiction' in the Regulation is crucial if service providers are to be able to provide the full benefits for subscribers required by the Regulation.

11. At the very least, guidance issued to consumers must therefore make it very clear that the benefits of the Regulation cannot be assumed to continue after Brexit. It should also be made clear that any limitation after Brexit regarding what content can be enjoyed on a cross-border portable basis and which countries that can happen in is first and foremost a consequence of Brexit with no relevant agreement with the EU rather than choices made by online service providers and right holders. Clarity in guidance for all stakeholders, including consumers, about whether or not the Government has any intention to try and reach an agreement so that all of the provisions in the Portability Regulation can continue as now after Brexit would also be extremely helpful.

Enforcement

12. We agree that effective enforcement of the Portability Regulation should be possible. The Government should, though, show that what it proposes in this respect is proportionate given the uncertainty about the continued application of the Portability Regulation after Brexit. In the case of enforcement that might be possible on behalf of consumers, any such interventions should also be guided by the principle of proportionality.
13. We would, however, like to stress that we do not want any of the comments in this response to be read as implying that we are not in favour of the consumer benefits flowing from the Portability Regulation. We would very much like the Portability Regulation to continue to function without any change after Brexit for the benefit of all stakeholders, including consumers. This includes the benefits of the 'legal fiction' provided by Regulation for online content services that provide access without payment of money. However, in the absence of knowing whether or not the application of the Regulation is likely to remain unchanged by Brexit, it is crucial that the Government carefully considers whether measures taken now are proportionate, and that any messaging or guidance does not raise the expectations of consumers about the availability of portability after Brexit.

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