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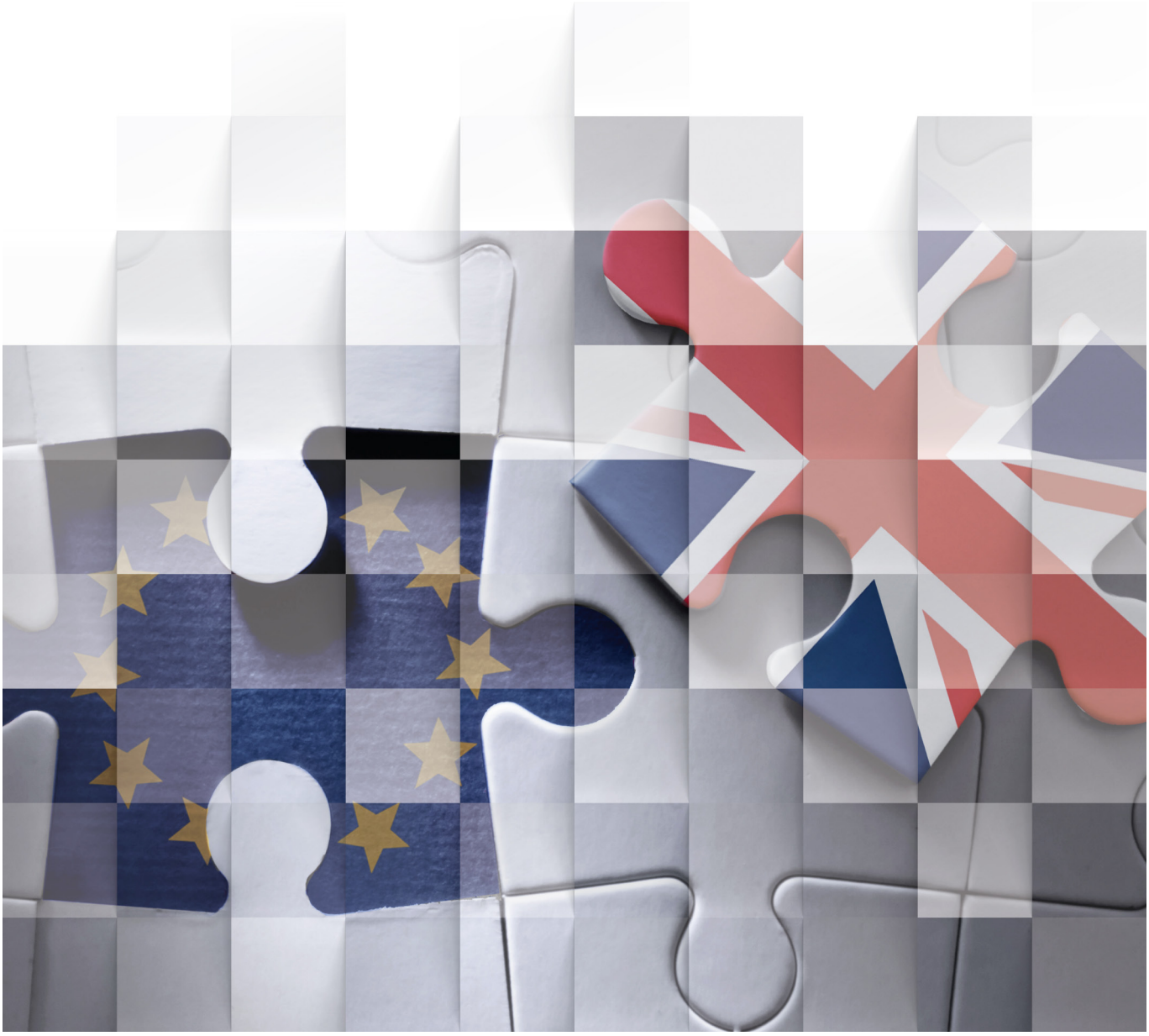
Entertainment & Media Industry Group

Client Briefing Pack

The implications of **Brexit** on the Entertainment and Media industry

July 2016



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Brexit: Entertainment and media

The UK has made its choice On 23 June 2016, the United Kingdom voted to leave the European Union. This historic decision will lead to a complex and unprecedented process of exit negotiations, which raises many political and legal questions. For businesses operating in the United Kingdom or the European Union these questions have led to a great deal of economic insecurity. Despite the current uncertainty, there will be opportunities for businesses in the entertainment and media sector to benefit from Brexit. These opportunities are detailed throughout this briefing.

The legal position The referendum outcome is not legally binding on the UK government. As a result, there has been much speculation about whether and when the government might serve the notice which is required under Article 50 of the Treaty of Lisbon to trigger exit negotiations with the EU. The apparent need for a full debate and vote in parliament prior to the invocation of Article 50 may further complicate the process. The recent appointment of Theresa May as the new prime minister (and the creation of a new governmental role entitled 'Secretary of State for Exiting the European Union') should provide clarity about the Parliamentary process which will be followed.

Once Article 50 of the Treaty of Lisbon is invoked, there will be a period of two years within which the UK will attempt to complete negotiations and exit the EU. This period may be extended, if there is unanimous agreement.

The UK's exit from the EU will also abolish the binding effect of European regulations and the judgements of the Court of Justice of the European Union. The UK will no longer be bound to adhere to EU directives and may choose to amend UK legislation to reflect this. The process of unravelling EU law from domestic law following Brexit will be complicated. National legislation that implements EU directives will need to be reviewed by the UK government in order to ascertain whether or not to maintain or replace relevant legislation. Many laws (for example, those that govern the UK's relationship with the EU digital single market) may need to be amended in order to acknowledge the new relationship between the UK and the EU.

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Options going forwards The potential options for the future relationship between the UK and the EU include:

- *The Norwegian model* – The UK will remain a member of the European Economic Area ('**EEA**') and join the European Free Trade Association ('**EFTA**'), providing the UK with access to the single market and subjecting it to EU standards and regulations. The EEA regime incorporates much of the EU framework, but removing the right to vote on forthcoming EU law, potentially undermining the rationale for greater autonomy.

- *The Swiss model* – Unlike the Norwegian model, the UK will not remain an EEA signatory and will not benefit from automatic EEA passporting rights. The UK will join EFTA and negotiate multiple bilateral agreements governing the UK's access to the EU. Negotiating this complex network of agreements will take some time.

- *The Turkish model* – The UK will form a customs union with the EU, adhering to the EU's overall trade policy. As part of the customs union, the UK's external tariffs are likely to be aligned with EU tariffs. Conversely, the UK will be required to negotiate distinct terms in respect of access to markets outside of the EU. Turkey, as part of its model, does not have access to the single market in terms of services. Given that services represent almost 80% of the UK's GDP, a similar system would be problematic for the UK.

- *The Canadian model* – The UK will sign a free trade agreement ('**FTA**') with the EU. The bespoke content of the FTA will be a matter for negotiation. An agreement between the EU and the UK is likely to include some access to the EU's internal market, but less than if the UK remained a member of the EEA. Again, the complex agreement will take a significant amount of time to negotiate. The FTA negotiations between the EU and Canada spanned over five years, concluding in 2014. The agreement is still not in force.

Your tailored briefing While the United Kingdom will not leave the European Union overnight, it is important to consider what the result of the Brexit referendum means to the entertainment and media industry. What are the challenges? How do we identify the business opportunities? This Reed Smith briefing sets out some of the specific impacts and opportunities that may apply to your business.

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Brexit: Advertising and marketing

Decline in advertising revenues The immediate effect of Brexit on the advertising industry will certainly be a decline in media spend from brands, due to the political and economic uncertainty. As a result, brands may even wish to reconsider their media strategies. A number of broadcasters and media owners have already seen a decline in advertising revenues owing to the economic uncertainty caused by Brexit. However, periods of economic uncertainly can be beneficial for advertisers, too. Studies have shown that advertisers who increase their advertising spend during a recession tend to be more profitable in the long term and may even increase their market share.

Aside from changes in media spend, we are also likely to see a change in direction with the creative. As with any period of economic uncertainty or even recession, advertisers tend to seek to reassure their customers, often launching campaigns which focus on their brand history. Their message is 'we've been with you through thick and thin, and we will continue to be with you'. In periods of uncertainty, consumers tend to be less adventurous in their buying habits and stick to those brands they know and trust.

Brexit will not immediately impact advertising and marketing regulation Brexit is unlikely to cause immediate substantive harm to the advertising self- and co-regulatory systems. The BCAP (UK broadcast advertising code) code and CAP (UK non-broadcast advertising) code (the codes) have been updated over time in light of changes based on both UK and EU legislation, and every revision has been subject to consultation between the various regulatory bodies, industry, consumer groups and, at times, the public. These principles are now enshrined within the codes, and it is very unlikely that we will see revisions of these codes in light of Brexit. Further, the Advertising Standard Authority's (ASA) enforcement of the provisions of the codes is very much based on its previous decisions, rather than trends, developments or opinions coming from the EU. The Committee of Advertising Practice has promised to begin dialogue with the UK government to understand the full implications

for advertising regulation and make any announcements via its website and newsletters in due course.

We also note that there are a number of areas of law relevant to advertising and marketing which will be impacted. Please see the data protection and trademark sections of this article pack, which are the areas most likely to be the affected by Brexit.

Brexit opportunities While the regulatory landscape may not change in the short term, Brexit may provide opportunities for advertisers in areas of regulation not yet enshrined in the codes, or where certain industries feels that requirements placed on them by the EU were too restrictive, such as with the recent Tobacco Products Directive which placed a ban on the advertising or promotion, directly or indirectly, of electronic cigarettes and refill containers on a number of media platforms, including television, radio, newspapers and magazines, or the restrictions in relation to the advertising of alcohol or HFSS foods. The UK may have an opportunity to have an advertising industry that takes a more liberal and creative approach than the rest of the EU. We are likely to see lobbying from certain industry groups seeking to enact changes to this effect.

Indeed, the main industry body, the Advertising Association (AA), is already exploring this opportunity. Immediately after the announcement of the referendum result, its chief executive Tim Lefroy wrote to the business secretary, Sajid Javid, and the culture secretary, John Whittingdale, urging them to "support responsible advertising self-regulation" and warning against bans related to public health issues. He wrote: "Advertising is the second largest creative industry, but more importantly it's an economic activity and bellwether for the economy as a whole. Advertiser confidence should be a high priority for government and a clear commitment to these principles would send an immediate, positive signal."

Advice: It does not appear that the regulatory or legal landscape in relation to advertising and marketing in the UK is likely to change dramatically in the short term. We will know more in due course. Both CAP and the ASA have said that nothing will change immediately. However, on the industry side the AA is looking to engage with the UK government to fight the advertisers' corner. We would urge our clients to contact us if they feel unfairly restricted in any way, so that we can assist in identifying and exploring opportunities to enact change.

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Brexit: Copyright

There is unanimity in the UK on one consequence of Brexit: the country will need to have an agreement with the EU covering trade in goods and services. But what elements of UK copyright law would be affected by Brexit, and should any of those consequences be addressed in such an agreement?

Impact of EU legislation on UK copyright law Up to now there have been two means by which UK membership of the EU has resulted in changes to UK copyright law:

- Through EU directives, of which there have been 17 that deal with copyright, performers' rights and related rights, such as databases and designs. These have all been implemented into UK law, chiefly through amendments to the Copyright, Designs and Patents Act 1988 (CDPA).
- Decisions of the Court of Justice of the European Union (CJEU) which have determined the meaning to be given to particular provisions in EU directives. Some would say that the CJEU in recent years has gone beyond that remit, and has been creating new law where uncertainties and vacuums exist, most notably as to the scope of the right of communication to the public.

As to the EU directives, it seems unlikely that the UK government will wish to set about removing the effects of any of them as part of any trade agreement; nor has there been any perceptible pressure from the UK industry for such removal. They include:

- The lengthening of the term of authors' copyrights to life plus 70 years, and even longer for the copyright in films and television programmes.
- The rule that the principal director of a film or television production is an author of it and hence an owner with the producer of the copyright in it.
- The rule that an EU member state may not retain or create exceptions to copyright protection other than those that appear in the exhaustive list of exceptions set out in the Information Society Directive.
- Rules as to the governance and operations of collecting societies.

- The rule that a satellite broadcast covering multiple EU territories is deemed for copyright purposes only to take place in the country of origin of the signals.
- The rule that copyright owners may only exercise their rights in respect of cable retransmissions of broadcasts from other EU member states through collecting societies. This and the satellite broadcasting rule (both deriving from the Cable and Satellite Directive) work very much in the UK's favour as an exporter of television channels for direct reception and cable retransmission in other EU member states. However, the fact that these provisions have been implemented in UK domestic law is not sufficient to ensure that the UK will continue to benefit from them; they will need to be preserved by a trade agreement.

The wording of the section of the CDPA that implements the cable retransmission rule reveals a headache for our parliamentary draftsmen and women. Section 144A talks of cable re-transmissions of broadcasts "from another EEA state". This language becomes puzzling unless the UK becomes, post-Brexit, an EEA state. The whole corpus of UK legislation that has implemented EU directives is going to have to be scoured for similar instances where the wording assumes that the UK is and will remain an EEA or EU member.

The forthcoming regulation on portability While changes to UK copyright law have so far been wrought by directives and CJEU decisions, a third source of change will soon be upon us in the shape of an EU regulation on cross-border portability of online content services. Unlike a directive, the regulation will not need to be implemented by UK legislation; it will be automatically binding on coming into effect. As it is likely to come into effect early next year, possibly two years before a Brexit actually occurs, UK online content services will have to be made portable throughout the EU during that interim period, but will have the benefit of the rule in the regulation that the use made of copyright works in the service only takes place in the UK. Upon a Brexit two years later, unless a UK/EU trade agreement provides otherwise, that rule would cease to be effective. This means that if the UK service provider wishes thereafter to continue to offer portability, it will have to clear rights for every EU member state, potentially with different rights owners in the respective states, just as today's transfrontier content services do. It certainly appears that it will be in UK online content service providers' interests to ensure that the trade agreement preserves the 'country of origin' rule of the regulation.

* * * * *

The Reed Smith Entertainment and Media Group is already assisting clients in analysing what elements of the copyright *acquis communautaire* are important for their businesses and should be preserved for the UK post-Brexit, and are working with industry groups to identify key issues for the respective sectors. We stand ready to provide whatever assistance your company may need.

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Brexit: Data Protection

Introduction The free movement of data is fundamental to international trade and communications. Data protection is one of the areas where Brexit could have a highly significant commercial impact, depending on the form of the UK's relationship with the rest of the EU.

The laws governing the handling of 'personal data' (data about living, identifiable individuals) are highly harmonised throughout the EEA, something which facilitates data flows within the region, as part of the EU's digital single market strategy. However, as well as promoting free internal data movement, the EU data protection framework imposes restrictions on personal data leaving the EEA's borders in order to preserve the rights and freedoms that EU citizens have in relation to their personal data. The framework came about through implementation of the EU Data Protection Directive (95/46/EC).

Countries outside the EEA are called 'third countries' (for example, the United States); specific rules apply before EU personal data can be transferred to third countries from within the EU 'safe data club'. The options include model data transfer contracts between an EU-based sender and the third country recipient, a formal 'adequacy' assessment of the third country's laws as determined by the European Commission, or the explicit consent of the individuals.

Advanced EU regulation on the horizon To make a complex situation even more complicated, organisations in the EU are currently preparing themselves for new, comprehensive legislation. In May 2016, the General Data Protection Regulation (GDPR) was finalised. This comprehensive overhaul of European data protection laws, which comes into force in May 2018, has been four years in negotiations. It heralds a new dawn of significantly increased obligations (tougher consent, data breach reporting), more stringent sanctions (up to 4 per cent of annual global turnover) and enhanced individuals' rights (including greater transparency and choice about the processing of their information).

With an implementation date of 25 May 2018 – and Brexit negotiations expected to take no more than two years after Article 50 is triggered – this poses some challenging choices for UK organisations: (a) prepare to comply with the GDPR, (b) continue to comply with UK data protection law or (c) aim for somewhere in between (a 'GDPR-lite'). Prior to Brexit, the UK Information Commissioner's Office (the UK regulator) was encouraging all UK organisations to start their preparations in view of the extent of the changes.

How will Brexit affect data transfers? If the UK leaves the EU and does not join the EEA, the GDPR will no longer directly apply to the UK from the point of Brexit. However, if the UK wishes to trade with members of the EU single market, then embracing national data protection standards that are recognised as being equivalent to the EU's GDPR should allow the UK to achieve 'adequate' status. This would then enable UK businesses to receive personal data flows from EU countries without further regulatory obstacles.

As for data transfers further afield, transatlantic businesses were thrown into shock last October when the EU's highest court ruled that the EU-U.S. data trade pact 'Safe Harbor was invalid. Overnight, one of the most popular legal routes (but not the only one) for EU to U.S. data transfers was barred. Safe Harbor will be replaced by the Privacy Shield, which has undergone final amendments and could be in effect by July. However, the Privacy Shield represents an EU-U.S. trade pact and therefore, following Brexit, the UK will have to negotiate its own deal with the U.S.

Brexit opportunities Whatever form of relationship the UK and the rest of the EU forge over the next few years, for trade reasons the UK is likely to want to maintain parity with the EU on data protection standards post-Brexit. What has undoubtedly changed is that there looks set to be some flexibility over how to achieve this – something which could present opportunities. Historically the UK's implementation of European data protection law, and its interpretation by the courts, has been considered more pragmatic and business friendly than in most other EU member states, and the Information Commissioner's Office has proven to be a practical and measured enforcer. The challenge for future data protection regulation will be whether the UK is able to steer a middle way between achieving adequacy of protection in its laws (and formal recognition as such by the EU) and yet do so in a manner which allows the UK to differentiate itself and become attractive to businesses as a data hub and trusted data custodian

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Brexit: e-Commerce

Introduction It was confirmed recently in the 2016 European B2C E-commerce Report that the UK is the leading e-commerce market in Europe. It has a market size of €157.1 billion and an average spend per e-shopper of €3,625. Additionally, 6.12 per cent of the UK's GDP derives from online sales and around 20 per cent of UK merchants sell to other EU countries[1]. The EU's digital single market strategy of simplifying cross-border transactions has been crucial in ensuring continued growth in this sector. It is therefore little surprise that 87 per cent of respondents in the UK tech sector opposed leaving the EU[2].

It has been speculated that Brexit may result in trade barriers being imposed on the UK and a potential shortage of tech talent. This will inevitably impact on the UK's payments fintech industry. Questions must also be raised about the future of the EU's digital single market strategy and the UK's continued adherence to the European e-commerce market framework set out in the E-Commerce Directive.

Trade barriers There is the possibility that leaving the EU may mean the UK loses access to the EU single market. The EU's free trade area allows goods and services to be passed unhindered by tariffs and other barriers between 500 million people. For UK online retailers, withdrawal from the EU single market could result in the resurrection of tariffs on products entering the EU. This may mean higher prices on British goods, which could choke the high demand coming from other EU countries. Furthermore, the weakened pound will also make European prices relatively more expensive, while trading uncertainty and cuts in interest rates are likely to impact negatively.

Dependant on the sort of relationship the UK establishes with the EU, there is the possibility that all imported goods from the UK may require quality control on entry into the EU single market. The EU principle of mutual recognition (under which EU member states must allow goods that are legally sold in another EU member state also to be sold in their own territory) may no longer

apply to British goods on the continent. UK goods may therefore require certification for entry into the European market.

In particular, Brexit will hit the UK's booming payments fintech industry. 'Passporting' of EU rules, which allows payments companies authorised in the UK to conduct business across the EU, will no longer be possible. Payment and money transfer companies may only be able to provide services in the EU if they obtain a separate EU licence via an office abroad. This could conceivably diminish London's appeal as a fintech hub and there is a chance that we will see the relocation of a number of fintech companies to other EU cities, most likely Amsterdam, Berlin, Dublin and Luxembourg City.

Talent drought The UK is already suffering from a shortage of talent in the e-commerce sector. This is because there aren't enough UK graduates specialising in maths and science to fill the necessary positions in developing and engineering. While the UK is currently home to 'Silicon Roundabout', one of the key tech hubs in Europe, it should be noted that a large portion of workers in the UK's tech industry are not UK citizens. Following Brexit, it is likely that the shortage of talent will only be exacerbated, as free movement of people may well be restricted. These additional barriers to immigration will make the business of recruiting quality employees even more onerous for small tech companies and may lead to an exodus of tech talent back to the continent.

EU legislation In 2015, the European Commission announced a digital single market strategy aimed at removing obstacles to the development of cross-border e-commerce within the EU and establishing a digital single market. Funding to implement this strategy is expected to reach €21.4bn[3]. This funding is derived from investments and support from the European structural and investment funds. Depending on how Brexit negotiations proceed, UK tech companies may miss out on this funding and may not be able to benefit from the greater ease with which e-commerce will be conducted across the EU.

When Brexit occurs, Britain must also consider its adherence to the EU internal market framework for e-commerce, which was set out in the E-Commerce Directive (and implemented into UK law via the E-Commerce Regulations 2002). The Directive ensures greater legal certainty for businesses and consumers, and greater ease of supply of e-commerce services across EU borders. While the E-Commerce Regulations may be amended or repealed in accordance with the exit terms negotiated by the UK government, it is nevertheless likely that UK tech companies would still have to adhere to the majority of the standards set out in the E-Commerce Directive if they want to continue trading with EU member states.

What next? The decision by the British public to leave the EU has created a level of anxiety among both the British and the European e-commerce sector. There is much uncertainty about how the trading relationship might change following Brexit. The process of the UK leaving the EU will take up to

two years, from the point the UK government formally notifies the EU of its intention to leave. Much will hinge on how Brexit negotiations proceed and whether the UK maintains access to the EU single market or develops a new relationship. It is important to note that until Britain officially leaves the EU, all of the current trading laws will continue to apply.

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1 http://www.ecommerce-europe.eu/news/2016/implications-of-brexit-for-e-commerce

2 https://www.theguardian.com/technology/2016/mar/04/britains-tech-sector-overwhelmingly-opposed-to-brexit

3 http://www.heraldscotland.com/business/13464471.Good_telecommunications_are_crucial_to_rural_communities/

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Brexit: Film and television

The UK film and television industries are highly successful international businesses, exporting and importing audio-visual product. Europe is a major market for them at all levels. It is probably not surprising, therefore, that 85 per cent of PACT's members and 96 per cent of the Creative Industries Federation's members indicated they would be voting to remain in the EU, or that the industries have greeted the news of Brexit with some dismay. There are undoubtedly challenges ahead for the industries, but there are also opportunities. Much will depend on how the future relationship with the EU evolves: there are more uncertainties than certainties. Some of the major issues for the industries are considered below. Others are covered in in the 'Copyright' section of this briefing.

Free movement

Production Free movement of cast, crew and equipment between the UK and the EU may be restricted. The process may become more bureaucratic, time-consuming and expensive. There could be requirements for entry and work visas, carnets, equipment levies or inspections. This may make it more difficult for UK producers to film in Europe, and for EU producers to bring productions to the UK. That said, the plethora of incentives and subsidies throughout the world (including Europe) are all designed to attract production because of the economic benefit to the host country of the considerable spend involved, and they compete with each other to attract productions. It will be contrary to the rationale of these if it becomes practically too difficult and expensive for productions to enter the relevant country.

Distribution Physical goods (DVDs, for example) might become subject to tariffs or other limitations on free movement.

Freedom of reception The Audiovisual Media Services Directive allows freedom or reception to service providers throughout the EU, provided their media and broadcast standards are regulated to minimum EU-wide requirements. Subject to those requirements being met, each service provider

is regulated by the laws of the country where it is based. The Directive is currently under review, and the UK will have lost its influence in shaping it. Post-Brexit, it will not in any event apply and the UK will need to rely instead on the Council of Europe 1989 'European Convention on Transfrontier Television', which is more limited and applies only to linear broadcasts. This could mean that cross-border transmission from the UK of on-demand services might be subject to local regulation in every country in which it is receivable.

Quotas Many European countries have quotas on the amount of European content their exhibitors and broadcasters must show. For example, the majority of French entertainment broadcast transmission time must be taken up with European product. If UK productions (or UK/U.S. co-productions such as *The Night Manager*) cease to be categorised as 'European', it will be harder to sell them at all, or on as good financial terms, as it was pre-Brexit. However, it is unlikely that UK content will cease to be regarded as 'European' for these purposes. The quotas derive from the Audiovisual Media Services Directive and 'European works' are already defined broadly in it to include works from non-member states that are members of the Council of Europe (as the UK is). Jean-Claude Juncker has spoken of the Brexit discussions being conducted without hostility, so it is hard to see how the EU might exclude UK works as 'European works' but accept as European works from non-EU member states.

Loss of MEDIA/Creative Europe funding Through its MEDIA/Creative Europe scheme, the EU provided over €100 million to the film and television industries between 2007 and 2013, helping to fund training, development, production, distribution and exhibition, and has invested in Screen Yorkshire. Seven films received more than €1 million of such funding, including *The Iron Lady*, *Slumdog Millionaire* and *The King's Speech*. The loss of this subsidy, post-Brexit, will affect almost every layer of the film and television industry. The UK government may, however, decide to use a small part of the savings it will make from no longer contributing to the EU budget to replace this subsidy. Farmers will be lobbying for agricultural subsidies to be replaced: the film and television industries need to do the same. The relatively recent broadening of the UK tax credit for television and games demonstrates that the UK government is sympathetic to the film and television industries and conscious of their economic and cultural importance.

State aid While it is an EU member, the UK is constrained by EU state aid restrictions, which among other things, prohibit the distortion of intra-EU competition and limit the amount of funding per project. These affect not just the structure of the tax credit, but also soft money available from the BFI and other government agencies. Post-Brexit such restraints will cease to apply, save to the extent they are incorporated into new trade deals.

When the film tax credit was originally introduced, its qualification requirements were directed towards elements (cast, crew, language, etc.) being British, but EU rules forced the UK to widen the criteria so they applied to all Europeans. A

film based on a Belgian story, made in the French language by an Italian crew with Spanish cast can qualify for the UK tax credit. We may see a recasting of the 'cultural test' to make it more UK-centric, but that is likely to be resisted by the EU in any negotiations of the future relationship.

Release patterns: the digital single market As part of its digital single market strategy, the EU is considering proposals that might mean audiovisual content available in one EU member state must be available in all of them, resulting in pan-European licensing. The UK will no longer be able to influence the EU's direction of travel, which is strongly resisted by the film and television industries, but it will also not be subject to the proposed new rules. This may result in in the UK being one separate territory and the remaining EU another. It will be business-as-usual for UK distributors, but UK producers will be faced with an entirely different distribution and financing landscape that breaks the traditional territorial model, and which is likely to make financing much harder to source. See also the client briefing 'Copyright', which details the regulation on portability.

Official co-productions It is worth saying that official co-productions are, from a legal point of view, unaffected, because there have been a number of comments in the press suggesting they are in jeopardy. Official co-productions are governed by the European Convention on Cinematographic Co-Production, which emanates from the Council of Europe (which has 47 members, and of which the UK has been a member since 1949) and not from the EU.

Currency gains and losses It remains to be seen whether the fall in sterling (against both the euro and the dollar) will result in more than a short-term realignment of the relative value of these currencies. If it does, there are winners and losers. A devalued pound will make it cheaper for productions (including big U.S. productions) to shoot in England. This is good news for studios and the film-services sector in the UK. But it will make it more expensive for British producers to film in the United States or Europe. It will also be good for the sellers of audiovisual product, since most distribution contracts provide for the buyer to pay in dollars and euros. The contracts will therefore become worth more in sterling. But it will be correspondingly bad news for UK buyers of product from Europe and the United States. The Brexit vote is also a reminder that unforeseen events can cause currency volatility and that, where practicable and economically viable, it is always sensible to enter into hedging arrangements to minimise risk.

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Brexit: Litigation

Jurisdiction As a member of the EU, the UK is subject to the Brussels Regulation (the Regulation), which was recast in 2015. The Regulation has ensured a unity of approach across the EU when deciding where claims can be litigated.

The basic rule is that a defendant may be sued in the EU member state in which he is domiciled. The Regulation also sets out special rules allowing a person to be sued in another EU member state in certain types of claim. For example, in contract claims, a person may be sued in the place of performance of the obligation in question. In tort claims, the claim may be brought in the place where the harmful event occurred.

In order to prevent multiple sets of proceedings being pursued across the EU, the Regulation also provides that the courts of EU member states should stay any proceedings where they are not the court first seised (unless there is an exclusive jurisdiction provision in a contract that is being litigated).

The current rules give relative certainty on where a claim might be litigated, which makes it easier to assess the risks when entering into commercial relationships. Post Brexit, this certainty will be lost, but the exact position will depend on the reciprocal arrangements that are agreed between the EU and the UK (if any). It is worth noting, however, that there will only be an issue where a case has connections to both the UK and another EU member state (e.g., where there is a French claimant and an English defendant, or where a German and Spanish company intend to litigate over a contract performed in England). Where there are proceedings between a UK entity and an entity from a non-EU country, or between entities domiciled in other EU member states, the position will remain unchanged.

If no reciprocal arrangements are agreed, the courts will rely on the current common law rules for determining jurisdiction (as they currently do when resolving issues in cases with connections to non-EU territories). The founding of jurisdiction depends on the ability to serve proceedings on a non-UK entity.

In order to obtain permission to serve out of the jurisdiction, the claimant must establish that (i) there is a good arguable case, (ii) the claim falls within one of the jurisdictional 'gateways' listed in Practice Direction 6B.3.1 of the Civil Procedure Rules, and (iii) the claim has a reasonable prospect of success.

Without the EU rules on related proceedings, there will of course be a greater risk of parallel claims running in the UK and an EU member state. However, it will also mean that UK litigants are no longer at risk from 'Italian torpedoes': claims issued in Italy (or other jurisdictions where litigation is notoriously slow) with the sole purpose of preventing proceedings in other EU member states where the matter might be resolved quickly. The removal of the EU ban on anti-suit injunctions will also be an advantage. Under common law rules, the English courts could once again issue an order restraining a party from commencing or pursuing proceedings in an EU member state. Although these orders will only be granted if certain requirements are satisfied, they are an effective remedy as a party will be in contempt of court if the order is breached.

Advice: If the EU and the UK agree to maintain some form of reciprocal regime, there are a number of options (which may not be mutually exclusive):

- The UK could formally accede to the Lugano Convention, which imposes a similar jurisdiction regime to the Brussels Regulation. The Convention currently governs jurisdiction as between the EU member states and Norway, Iceland and Switzerland.
- The Brussels Convention, which the UK signed when it joined the EEC, could continue to apply.
- The UK could sign up to the Hague Convention, which provides for the mutual recognition of exclusive jurisdiction clauses. The EU is a signatory of the Hague Convention.
- The UK could negotiate reciprocal arrangements with each individual EU member state.

The rules on related proceedings in the Brussels and Lugano Conventions are similar to those in the Brussels Regulation, which may mean that the 'Italian torpedo' problem will remain.

If claims are brewing before Brexit, it would be worth issuing as soon as possible if it will benefit you to rely on the current regime.

In order to increase the chances of litigating in your favoured jurisdiction, it is advisable to ensure that exclusive jurisdiction clauses are included in contracts. Although the extent to which they will be enforced is not entirely certain, especially if no reciprocal arrangements are put in place, they should still be included as some courts will enforce them.

You may also wish to consider including arbitration clauses in contracts instead of allocating jurisdiction to the courts of a particular country. The arbitration regime will not be affected by Brexit (and, in fact, it may be strengthened as it may once again be possible to issue an anti-suit injunction where a party breaches an arbitration clause by issuing proceedings in an EU member state).

Enforcement As well as rules on jurisdiction, the Brussels Regulation contains provisions relating to the enforcement of judgements within the EU. At present, if a judgment is obtained in an EU member state, the mechanism of the Brussels Regulation means that it will be recognised by the courts of other EU member states, and duly enforced. There is also a simplified enforcement procedure for 'uncontested' claims under the European Enforcement Order regime.

If no reciprocal arrangements are put in place post-Brexit, litigants who wish to enforce an English court order in an EU member state will have to comply with the rules for enforcement of foreign judgments within the relevant EU member state. It is therefore likely to take longer and cost more to enforce a judgment, and there may be questions over whether certain types of relief granted by the English courts will be recognised in EU member states (for example, declarations and injunctions).

Similarly, it will become more complicated for litigants to enforce in England a judgment given by the court of an EU member state. The claimant will have to comply with the English rules for enforcing foreign judgments, which require a fresh cause of action to be commenced in the English courts (with the foreign judgment being the cause of action).

Advice: If you have in your possession a judgment granted by the English court that needs to be enforced in another EU member state, you should make sure you enforce it as soon as possible so that you can take advantage of the current regime. The same consideration applies if you need to enforce the judgment of another EU member state in England. You may also wish to expedite current proceedings where possible so that judgment can be given and enforced before Brexit (unless you are the defendant, in which case it may benefit you to delay them, as far as the law and procedure permits).

Post-Brexit, if you are bringing an English claim that will require enforcement in an EU member state, you should take legal advice on enforcement in the relevant EU member state before the claim is issued. Similarly, if a claim to be brought in an EU member state will have to be enforced in England, you should take English law advice on enforcement.

Enforcement – IP The UK is currently required to comply with the provisions of the IP Enforcement Directive. Certain aspects of the Directive, such as the award of damages for 'moral prejudice' in IP cases, have proved controversial. It is likely that the English judiciary will take the opportunity to do away with the more controversial aspects post-Brexit.

One major disadvantage of Brexit for EU trademark owners is that it will no longer be possible for the UK courts to grant a pan-European injunction where a mark has been infringed. Trademark owners who wish to prevent infringements across the whole continent will have to start proceedings in both the UK and the EU, which will increase the costs and complexity of enforcing their rights. Further, it is difficult to say what the status of existing pan-European injunctions would be. It is possible that the beneficiary of such an injunction would have to apply for a separate injunction in the UK.

Service The provisions of the Brussels Regulation allow claimants to serve proceedings out of the jurisdiction without permission if the service is to be effected in an EU member state. Post-Brexit, claimants will have to apply to the English court for permission, which will delay proceedings and increase the costs. As the EU Service Regulation will no longer apply, effecting the service once permission has been granted will also take longer and cost more. In contracts with EU-based counterparties that provide for English jurisdiction, it is therefore advisable to include a clause requiring appointment of an agent for service in England.

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Brexit: Music

As one of the chief Leave campaigners, John Whittingdale was always likely to be of the view that the departure of the UK from the European Union would have limited impact on the music industry, and he said as much at a House of Commons event.

Unfortunately, 91 per cent of the industry disagreed with him when asked before the referendum whether they would rather remain or leave. The music sector, for the most part, has reacted negatively to Brexit.

There are two reasons for this. First, UK music is heavily reliant on international trade. Second, legal and contractual arrangements concerning music and its exploitation are already complex. Brexit will likely add more layers of challenge and complexity, for artists, rights holders and music users. Below is a summary of the key areas for review for those whose business involves music.

Live and touring businesses, festivals and music production Until the conclusion of the period of negotiations between the UK and the European Union, it is not yet clear the extent to which, if at all, the existing ability of artists, production crew and tour equipment to move freely within and between European countries would be restricted or limited. Where UK artists and performers suffer changes to the manner in which they conduct their tours as a result of Brexit, those changes could fall within a broad spectrum, ranging from limited obtrusiveness to more extreme challenges, such as entry and work visas, carnets, equipment levies or inspections and additional customs or border restrictions.

On a more positive note, the UK has the opportunity to make itself the destination of choice for artists and performers from other countries. The potential combination of a weaker pound and the possibility of lobbying for tax or production incentives (such as for recording music or video) and more favourable copyright laws may result in an influx of talent and entertainment into the UK.

Advice: Upcoming tour and production arrangements in the near future are unlikely to be materially affected by Brexit. Given the political tension between the principles of free movement of people on one hand and free movement of goods and services on the other, it seems likely that considerable attention will be focussed by many different industries on issues such as entry and border requirements, free movement of equipment and cross-border trade. Those companies involved in touring, production and the broader music business should consider how best to make their voices heard, perhaps aligning themselves with similar businesses in other sectors (such as, perhaps, film, television and other live event industries).

Any longer-term contractual touring arrangements should be examined and evaluated in the context of an unfavourable outcome of Brexit negotiations with the EU. Where possible, promoters and managers should consider the inclusion of contractual provisions which may help mitigate risk in the event of legal restrictions or changes that negatively impact concerts or production in European countries.

Pan-European music licensing arrangements Collective licensing arrangements have been almost entirely shaped by European law over the last 10 years. Since the European Commission's recommendation on the management of online rights in musical works in 2015, both the music publishing and sound recording industries in Europe have plotted a course towards pan-European licensing. This includes not only contractual arrangements that contemplate the grant of licences under homogenous terms applicable to the European Economic Area, but also the formation of 'option 3' licensing vehicles whose structure, both from a corporate and operational perspective, is predicated on the UK being part of the EU.

Given the time before changes take effect, pan-European licensing will probably not be affected in the near term. However, currency fluctuations affecting cross-border licensing arrangements cannot be ignored, either by digital music users who struggle to make a profit, or by rights holders who rely on processing and licensing structures that include the UK as part of Europe. If currency fluctuations continue so that sterling remains adrift of the euro, we may expect changes to pan-European licensing rates for the UK.

In recent years, the differences between US and EU laws affecting digital content distribution and, particularly, music, have been stark. This has led to certain music services (most notably, Pandora) failing to launch in Europe. Although there continues to be statutory and regulatory divergence on core licensing principles (mandatory licensing of musical compositions, rights attached to sound recordings, remuneration for performers) across the Atlantic at the present day, it remains to be seen in the longer term whether Brexit could have the effect of allowing the UK to forge a closer alliance with the United States on core music licensing law issues.

Advice: Both music rights holders and licensees should review licensing arrangements that cover Europe, or the UK and a European country, and determine how they may be affected by Brexit in the longer term. Preparation should be made for revisions or alternative approaches to negotiations for renewal of existing licences. When entering into new licences for pan-European exploitation, music users should consider whether the inclusion of provisions that legislate for possible effects of Brexit (such as further currency fluctuations, withdrawal of repertoire or termination of reciprocal licensing arrangements between collection societies) are appropriate.

Sales of UK recorded music in other jurisdictions It has been speculated that UK labels and publishers could be faced with tariffs on their exports, and that cultural quotas concerning the amount of European music that should be played on radio stations or other services could be applied, to the detriment of British music.

While it may be the case that additional burdens could be placed on the import and export of physical media as between the UK and Europe, given the rapid deterioration of physical music sales generally (save for vinyl), the impact of this would continue to soften over time. If levies or barriers were applied to British music in a digital context, this may prove to be a more difficult challenge for the UK music industry.

Advice: Companies that are involved in the licensing, production or distribution of music in physical format should consider their existing contractual arrangements, as well as their operations.

Copyright law and policy Notwithstanding that copyright law in the UK has implemented the requirements of several European directives, in many respects it remains nationalistic. A good example of this is the UK's position regarding private copying, which has for many years contrasted with the position adopted by other countries in the EU. The successful judicial review action of the MU, BASCA and others concerning the UK government's introduction of a private copying exception without providing fair compensation for songwriters, musicians and other rights holders within the creative sector, is a good example of how Brexit may amplify the unique nature of our copyright laws. In the case, the music industry argued that the private copying exception contravened Article 5(2)(b) of the European Copyright Directive – after Brexit, this argument would unlikely be effective.

We do not see any immediate drivers for drastic changes to existing UK legislation after the end of the negotiation period following an Article 50 notice. However, we do foresee a period of lobbying, advocacy for change, and perhaps even litigation. In circumstances where the UK is no longer part of the EU, some might seek a departure from existing Europe-friendly legal positions. The counter-balance is that the views of the UK may hold less weight in some of the ongoing debate surrounding the Commission's digital single market (DSM) strategy, which is intended to enable the free movement of digital content around the EU.

Most commentators agree that the reduced ability of interested UK parties to directly participate in DSM discussions and influence the terms of new European directives or regulations pertaining to copyright or other legal issues affecting the use of music will not be a good thing. On the other hand, the combination of a vibrant and successful UK music industry and a distinct voice when lobbying European institutions may result in the UK industry being able to gain an advantage in its international trading arrangements, particularly with the United States and other key music markets outside of Europe.

The effect of Brexit on UK copyright law will largely be determined by the terms of the UK's overall departure from the EU. In circumstances where the UK continues to access the EU single market, it seems unlikely that UK copyright laws will not continue to mirror EU legislation, either as an outcome of the Brexit negotiations or as part of stimulus measures to enable ongoing pan-European trade and access to content (i.e., the DSM). A more radical outcome might be that in an effort to boost the UK creative economy, the UK government's policy on copyright legislation could veer more toward that of other trading countries (such as the United States) or be more generally favourable to rights-holders and creators. An example of this might be the creation of additional copyright protections for songwriters and content owners.

Advice: Through trade associations and individual lobbying efforts, be prepared to make your voice heard through the appropriate channels. To the extent possible and appropriate, we suggest companies with aligned interests in trade-related negotiations should collaborate with a view to presenting a united front to regulators, or those charged with negotiating a UK trade position with European countries.

Safe harbour and the value gap There have been disputes and litigation concerning the reliance on so-called 'safe harbour' laws by user-upload services in many countries in Europe. In the UK, E-Commerce Regulations 2002 implement the E-Commerce Directive. Although safe harbour has been disputed in the UK through the courts (most notably in the case of PRS v SoundCloud, which settled), there has not been a clear court decision concerning the manner in which user-upload and social media services may operate. In circumstances where English courts would not be forced to follow EU laws and decisions, UK judges will have greater freedom to create their own precedents. However, unless the Regulations are amended by the UK government, it is likely that the campaign by the music industry to close the 'value gap' will continue to be hard fought.

A more pronounced effect may be felt by social media and user-upload services operating in the UK. In several respects, regulation concerning user-upload services in the UK has been less stringent than in other European jurisdictions (for example, laws in Germany relating to youth protection and regulation in France concerning consumer rights and advertising are more onerous for social media services than the laws in the UK). It may be the case

that UK regulators determine to take a lighter or alternative approach with social media services.

Advice: Any business or platform which includes music (or content which includes music) that has been uploaded by users should ensure that it participates in public affairs and lobbying efforts at the European Commission during the next two years. Platform owners should look out for domestically focused initiatives concerning platform regulation, or the management of content on user-upload services, and adapt their public affairs efforts accordingly. As a minimum, user-upload services should consider the terms of use and policies which apply to their services in the context of Brexit, including notice and takedown procedures.

Reciprocal arrangements between collection societies It is worth including mention of the reciprocal arrangements between collection societies, particularly in Europe. There has been, over the last few years, a general consolidation of music composition collective management organisations. It is claimed that this consolidation promotes competition and drives efficiency. While this may be the case in some instances, it has led to an inexorable rise in prices from a music user perspective.

Brexit may yet have a disruptive effect on the network of collection societies and their reciprocal arrangements. We would anticipate that most, if not all, European collection societies will be examining their reciprocal arrangements, both in light of Brexit and as an ongoing process, as the market for collective rights management and the accumulation of rights generally continues to consolidate. Music users should be alive to this market dynamic, and consider it carefully when formulating their pan-European music licensing strategies going forward.

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Brexit: Trademarks

Legal consequences The key legal consequences of Brexit for trademark owners are as follows:

- European Union Trademarks (EUTMs) will cease to have effect in the UK, unless special arrangements to remedy this are put in place. For example, the EU and the UK may agree that all EUTM owners may opt to split their registration into an EUTM and a UK national registration (perhaps even maintaining the filing date for both), or even that the UK should remain part of the EUTM regime.
- It could be easier to obtain a registration for a UK mark. Owners of EUTMs would no longer have any right to object to identical or similar marks that are the subject of a UK national registration. Likewise, UK marks could not be used as a basis for an opposition to new EUTM applications.
- Aspects of UK trademark law are based on EU legislation, and the English courts have been obliged to interpret it in line with EU case law. English judges have often been vocal in their opposition to the approach taken by the EU judiciary in trademark matters. If they are no longer bound by CJEU court decisions post-Brexit, English trademark law may well begin to diverge from EU law. Eventually, this divergence may mean that EU-wide licensing and enforcement strategies will need to be reviewed.
- Any trademark licences or co-existence agreements designating the EU as a territory will need to be reviewed. Whether each agreement will continue to apply in the UK post-Brexit will depend on the construction of its terms, but it may be advisable for the parties to agree on its effect to avoid any uncertainty.
- Where an EUTM has only been used in the UK, it could become vulnerable to revocation for non-use unless the owner starts to use it elsewhere in the EU within five years of Brexit.

- International registrations under the Madrid system, which cover the EU as a territory of protection, will no longer be protected in the UK.
- See also our comments on IP enforcement in the litigation section of this article pack.

Advice: The true effect of Brexit on the trademark regime will not be known until post-Brexit arrangements have been agreed between the UK and the EU. However, in order to mitigate any uncertainty, it would be wise to take the following steps:

- Where key brands are protected only by EUTMs, it is worth considering a separate domestic filing with the UK Intellectual Property Office.
- Apply to register new marks in both the UK and the EU.
- When registering new marks under the Madrid System, designate the EU as a territory, and also separately the UK, to ensure continued protection. Trademark owners who have existing registrations designating the EU should also designate the UK as a separate territory.
- Where licensing and co-existence agreements designate the EU as a territory, discuss and agree the scope of those contracts with your partners.

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