

# Copyright after Brexit- challenges and opportunities for both sides of the Channel

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Following a referendum on 23 June 2016, 51.9% of UK voters said "yes" to Brexit. British Prime Minister Theresa May revealed earlier this month that Article 50 TEU will be triggered by March 2017, marking the beginning of the formal withdrawal process.

It is hard to predict the impact of Brexit on the current copyright framework, since much will depend on the agreement reached between the EU and the UK. Several options are possible, from a custom-made agreement to an EFTA or EEA type of agreement; or even no agreement at all, which would make the UK a "third country" vis-à-vis the EU. Each of these solutions entails different consequences for both parties involved.

From a political perspective, it seems that a clash is on the horizon: the UK is likely to want to negotiate a "cherry pick agreement", i.e., an agreement where it gets to pick and choose the EU rules it wants; whereas the EU will probably prefer an "all-or-nothing" approach. Moreover, in the field of intellectual property, and if the free trade agreements negotiated by the EU with third countries are anything to go by, it can be expected that the EU will want to export its intellectual property standards, enforcement included. How and to what extent the EU will be willing to deviate from this practice is unknown. But to this political context it should be added that, according to Article 50 para. 2 TEU, the agreement with the UK is to follow certain guidelines provided by the EU Council, which in turn is composed of the heads of state or government of the Member States. The [political indigestion](#) created by Brexit across Europe might not favour the UK when the time comes to negotiate the terms of the Brexit agreement. It is thus difficult to foretell to what extent the UK will manage to get a custom-made agreement - in copyright and beyond. Part of the consideration below is therefore dependent on that missing part of the puzzle.

## From the point of view of the United Kingdom

Should the UK not be obliged to maintain its laws in line with the EU copyright acquis, it might take the opportunity to "**customise**" its copyright law. The precise way in which the UK will be able to do so is however unclear. The EU copyright directives have been implemented by [Statutory Instruments](#)- a legislative instrument of secondary nature that depends on a "parent Act", in this case the [European Communities Act of 1972](#) (by which the UK joined the European Community). The British Secretary of State for Exiting the European Union has [announced](#) plans for a "Great Repeal Bill", which would repeal the European Communities Act. This would repeal the legislation enacted under it (read: all the statutory instruments implementing the EU Directives), unless the "Great Repeal Bill" expressly saves subordinate legislation (as explained excellently and at length [here](#)). What is saved, if anything, is yet another unknown element, and most likely highly dependent on political compromises.

With those notes in mind, we can think of a few examples that illustrate the difficult decisions ahead. Let's take, for instance, the sui generis right for databases. Would this be a serious contender for the title of EU relic within a new UK copyright law? On the one hand, databases (both content- and structure-wise) were already protected to a considerable extent in the UK prior to the Database Directive, due to the (lower) British threshold for protection. In addition, the European Commission [acknowledged](#) that the economic effect of the sui generis right is unproven, and earlier this year the European Parliament [called on](#) the Commission to abolish the Database Directive. Given Europe's own scepticism regarding the Database Directive, and since the UK has a pre-Directive tradition of database protection to fall back on, a return to a pre-Directive scenario would thus not be as far-fetched as it might seem at first sight. On the other hand, the return to an untouched "skill, labour or judgment" threshold will depend as well on how UK Courts apply the originality criterion in a post-Brexit world (which is both a challenge, and a customisation opportunity, in and of itself). Moreover, and perhaps more importantly, the UK is the most productive database maker in relative terms (as shown in the [First Evaluation of the Database Directive](#)). That being the case, the UK might not want to risk their databases being ineligible for sui generis protection in the EU (which could happen under the reciprocity clause of the Directive if the UK gets a "third country" type of deal, again of course dependent on the terms of a potential agreement in that regard). Access to the EU market and uncertainty regarding the threshold of protection absent the sui generis right might therefore mean that the UK will want to keep the very European sui generis protection for its databases.

Another example is the resale right. The UK was a strong opponent to the introduction of a resale right, one of the reasons being fear of displacement of art sales to third countries that didn't have a resale right. Even though [no evidence of displacement of art sales was found](#), the case remains that British stakeholders are divided in their opinion of the resale right, with some (e.g., [art dealers](#)) claiming that it has negative effects, while others (such as [artists](#)) have a positive outlook on it. With whom a potential new UK copyright law would side is a complex issue to predict.

Many more examples of prospects for the UK to customise its copyright law could be found. Judging from the ones mentioned above, however, it can be argued that the opportunity to customise UK copyright law also poses considerable challenges. The introduction of EU rules in the UK legal order has brought about benefits to (at least) some factions of British society. Justifying getting rid of those "European perks" to their respective beneficiaries might be a tough task. Not getting rid of them, on the other hand, might meet opposition by stakeholders not deriving any advantage from EU rules, and from the crowd of Brexiters. Decisions on how to customise copyright law, if they are at all possible, might thus come down to a question of political convenience and lobbying strategies - much to the detriment of the copyright system as a whole, as well as its users.

Yet another interesting point of discussion is the **relevance of the case law of the CJEU**. What will be the impact of both pre-Brexit and post-Brexit CJEU case law on the UK legal order? In relation to the former, some past examples illustrate a certain British resistance to accepting CJEU jurisprudence *tout court*. For instance, with regard to the definition of originality, it has taken UK courts a few decisions to internalise the EU threshold of "author's own intellectual creation" as advanced by the CJEU in *Infopaq* (see the hesitation of the British court in using the CJEU threshold, e.g., in *Meltwater* or in *Taylor v Maguire*).

Whether UK courts will take the opportunity to go back to the previous British definition of originality (and other pre-CJEU British interpretations of EU directives) remains to be seen - not least because it is still unclear which parts of EU copyright will be kept in UK copyright law. The reason to follow previous CJEU case law (EU membership) ceases to exist, but it is possible that, for reasons of legal certainty, the UK courts will choose to stick to the CJEU interpretations already incorporated in their rulings. It is also possible that the "Great Repeal Bill" or ensuing laws that save particular aspects of EU copyright law establish rules on precedent and interpretation of those EU law rules that the UK decides to keep.

CJEU case law post-Brexit will in principle cease to be binding on the UK, unless e.g. a future agreement between the UK and the EU includes compulsory jurisdiction of the CJEU over the remaining aspects of EU law in the UK legal system. Regarding such remaining aspects, and absent a binding force of CJEU case law, it will be interesting to observe how the same (EU) copyright rules will evolve on the two sides of the Channel as a result of different judicial interpretations (i.e., by the CJEU, on the one hand, and by British Courts, on the other).

Brexit will also mean that the UK will now be entirely responsible for **concluding international agreements and treaties** that cover the commercial aspects of intellectual property, including copyright. A few previous agreements concerning intellectual property, such as TRIPS, have been entered into by both the EU and the UK. Other instruments, however - notably, free trade agreements with non-EU countries, many of which include intellectual property provisions - have been entirely concluded by the EU. After Brexit, the UK will no longer be party to those and will have to negotiate new agreements with said countries - presumably with much less bargaining power.

## From the point of view of the European Union

The first foreseeable consequence of the UK leaving is that, without the main representative of common law systems, the EU might incline towards a **civil law approach to copyright law**. With the UK gone, the need for political compromise between civil and common law solutions will no longer have the same weight. For example, and coming back to the question of originality, its definition as the "author's own intellectual creation" in the Computer Programs Directive has, as the Commission [admitted](#), "required 12 Member States to lower the threshold for granting protection and the remaining three to "lift the bar"". This denotes the compromise character of the originality criterion, to which surely the weight of the UK on the side of the lower threshold for protection contributed. In other words, the UK's influence in achieving common ground solutions between different legal traditions is not to be disregarded; in the battle between civil law and common law influences, the odds are now tilted towards a victory of the former.

Still, this probably won't result in a harmonisation of too-hot-to-handle potatoes, such as moral rights (also because their connection to the building of an internal market can be disputed). The same goes for copyright contracts. Even though the UK is a strong advocate for freedom of contract (and therefore adverse, in principle, to regulating this area of copyright law), an EU without the UK would not necessarily proceed to harmonising Member States' laws on copyright contracts: the marked differences between the remaining 27 national laws would require a level of political agreement that just does not seem plausible.

A related question is whether, with the UK gone, the EU might be one step closer to having a **unified copyright title**. In its [contribution](#) to the public consultation on the review of EU copyright rules (2014), the UK advised the Commission against "rushing into" an EU single copyright title. A [similar stance](#) had been taken back in 2011, regarding the consultation on the Green Paper on the online distribution of audio-visual works, where the UK showed a preference for looking into other legislative and non-legislative options before considering an EU copyright code. However, to be fair, other Member States, such as Slovakia, Italy, Poland, or Latvia, argued against the creation of an EU single copyright title in their respective contributions to the 2014 consultation - which might indicate that the "no-code" team lost a player, but not the game.

Another point to consider is the EU rule on **exhaustion of the distribution right**. This would not be a problem should the UK get an EEA status, as the exhaustion rule applies there. The same goes for the case where an exhaustion rule is negotiated between the UK and the EU in a custom-made agreement (or in an agreement whereby the UK vows to keep the laws implementing the directives containing the exhaustion rule). However, if none of these scenarios occur (e.g., if the UK gets a third-country status with no agreement on this point), this would mean that copyright protected goods first placed on the UK market would not exhaust the distribution right of the right holders (see on this Recital 28 of the InfoSoc Directive and [Laserdisken](#)). The right holder could therefore oppose the import of such goods into the EU (much to the detriment of trade of copyright goods in and out of the UK).

Many other copyright issues deriving from Brexit could be outlined, from either point of view. The EU will, without a doubt, miss its main common law player. But, all in all, it seems that in this complicated divorce the UK will face the bigger challenge. Many aspects of EU copyright law are imprinted on the UK's own copyright system, and untangling them will require considerable amounts of skill and labour (no pun intended).