Brexit and copyright law: will the English courts revert to the 'old' test for originality?

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Abstract: The decision in Infopaq has raised the originality threshold under English law: the 'author's own intellectual creation' test will remain the threshold for originality in databases. This article considers the impact that the Brexit vote will have on the CJEU’s decision in Infopaq, and whether the UK might revert to a different threshold post-Brexit. It seems likely that at least some judges will see this freedom as an opportunity to revert to the pre-INFOPAQ test for originality.

What role does ‘originality’ play in assessing whether copyright subsists? The threshold for copyright protection in the UK, and whether the UK might revert to a different threshold post-Brexit? Does the CJEU’s decision in Infopaq remain on the UK’s statute book, and will English judges assess originality in line with CJEU jurisprudence, and the English case law which has been shaped by it?

Within the EU, the threshold for assessing whether copyright subsists in particular works is generally set harmonised (although there are some notable exceptions). In the UK, the originality threshold has historically been low. Literary, dramatic, musical and artistic works which have to be ‘original’ is defined by s.1 of the Copyright, Designs and Patents Act 1988 (CDPA) for copyright to subsist at all. This threshold has been described in various terms, including the ‘labour, skill or effort’ test and the ‘author’s own intellectual creation’ test. These are both harmonised tests, as they reflect the EU’s approach to copyright. The CJEU has held that the reproduction of a 11-word extract from newspaper articles amounted to copyright infringement, which set a higher threshold for copyright protection in the UK. This case was followed by many other cases.

In continental European countries, a literary, dramatic, musical or artistic work must generally possess a creative element, or be seen as a new expression or arrangement to be protected by copyright (although any application to a database must also pass the ‘autonomy’ test). This continental European approach to assessing originality has been introduced into EU law and thereby into UK law in Article 6 of the Information Society Directive (2001/29/EC).

In 2011, the Court of Appeal in Infopaq took the view that Infopaq raised the originality threshold under English law: the ‘author’s own intellectual creation’ test will remain the threshold for originality in databases. HHJ Birss (as he then was) confirmed his view that the work in question was

The English courts have been offering opportunities to the question of whether the CJEU’s decision in Infopaq has raised the originality threshold under English law.

In 2013, the Court of Appeal in SAS Institute v World Programming Limited took the view that Infopaq has raised the originality threshold under English law: the ‘author’s own intellectual creation’ test will remain the threshold for originality in databases. HHJ Birss (as he then was) confirmed his view that the work in question was

Other judges have not been so definitive and have preferred to conflate the tests. For example in Explanatory Notes (2015) PLC v The Times Newspapers Ltd, HHJ Henry J took the view that Infopaq took the view that Infopaq raised the originality threshold under English law: the ‘author’s own intellectual creation’ test will remain the threshold for originality in databases. HHJ Birss (as he then was) confirmed his view that the work in question was

Although the CJEU refers to an ‘intellectual creation’ it does not mean the work was created by the author nor that it was entirely new. What is important is that it was the author’s own intellectual creation. The ‘labour, skill or effort’ test was created by the author but was not entirely new. What is important is that it was the author’s own intellectual creation.

If the Information Society Directive has changed the traditional domestic test, it seems to me it would stand rather than revert to the traditional copyright law after Brexit.

In time, English judges may be inclined to revert to assessing originality on the basis of ‘labour, skill or effort’ as post-Brexit. However, there are two key factors which might result in the continental European approach to originality impinging on the English law.

The CJEU’s decision in Infopaq has raised the originality threshold under English law: the ‘author’s own intellectual creation’ test will remain the threshold for originality in databases. This article considers the impact that the Brexit vote will have on the CJEU’s decision in Infopaq, and whether the UK might revert to a different threshold post-Brexit. It seems likely that at least some judges will see this freedom as an opportunity to revert to the pre-INFOPAQ test for assessing originality.