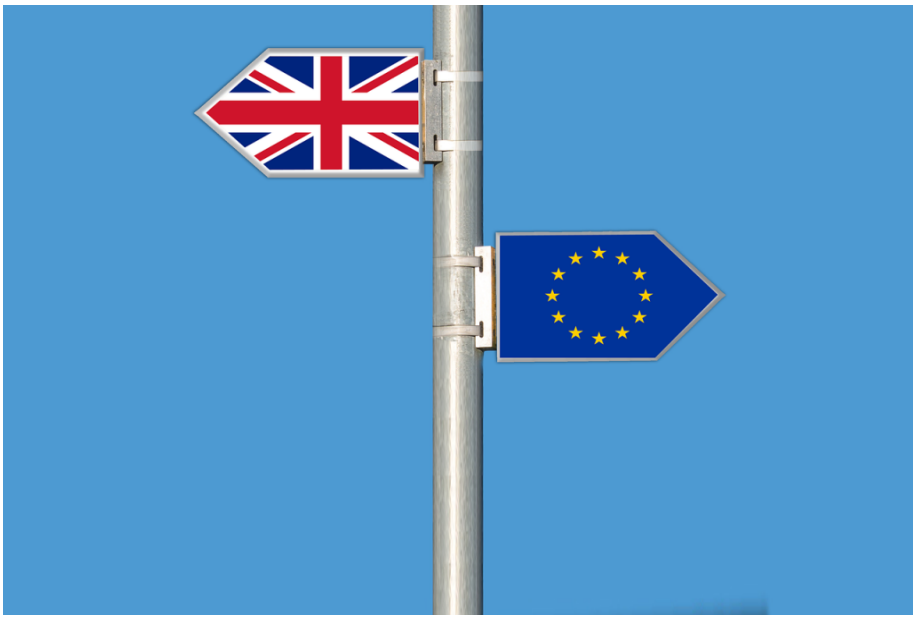
Kluwer Copyright Blog

What happens to copyright in the UK following Brexit?

Jeremy Blum, Toby Headdon (Bristows LLP) · Wednesday, December 19th, 2018



The terms of the UK's future relationship with the EU have yet to be concluded and so there is inevitably a degree of uncertainty about what Brexit ultimately means for copyright in the UK. Recent developments in parliament mean the Brexit uncertainty is higher than ever.

The future relationship will really only crystallise sometime after the UK has actually left the EU, which under the current arrangements is supposed to happen at 11pm on 29 March 2019 ('exit day'). The Brexit machinery has many moving parts and to appreciate its potential impact on UK copyright it is necessary to examine some of these.

The Withdrawal Agreement

Much of the current focus, at least politically, has been on the terms for the UK's separation from the EU rather than those concerning their future relationship. This separation is addressed in the highly contentious Withdrawal Agreement. The Withdrawal Agreement may yet change and the following analysis has to be read with that possibility in mind.

Title IV of the Withdrawal Agreement addresses intellectual property, although there is no express reference to copyright in it. This is unsurprising in the sense that in contrast to other intellectual property rights there has been only a limited degree of EU harmonisation of copyright.

Clearly it is going to take some time to negotiate the terms of the future relationship and therefore the Withdrawal Agreement, at least as it presently stands, provides for a transition period from the date of exit and ending on 31 December 2020. During this transition period, EU law would continue to apply in the UK. So while there is no express reference to copyright in Title IV, for the transition period at least, EU law relating to copyright would continue to apply.

The Political Declaration

In addition to the Withdrawal Agreement, the Department for Exiting the European Union has published a Political Declaration which sets out the framework for the future relationship. Title VII (Intellectual Property) of the Political Declaration addresses copyright only at a very high level. Notably it refers to preserving the "current high levels of protection, inter alia, of certain rights under copyright law, such as the sui generis right on databases and the artists' resale right."

The reference to "certain rights under copyright law" reflects the fact that only certain aspects of copyright law have been harmonised in the EU. The aim of the Political Declaration is to preserve the level of protection accorded to those harmonised aspects in any future relationship between the EU and the UK.

The European Union (Withdrawal Act) 2018

The European Union (Withdrawal) Act 2018 ("the Withdrawal Act") repeals the European Communities Act 1972 on exit and ends the supremacy of EU law in UK law. At the same time, it also provides that directly applicable EU law, such as regulations, have effect in UK law without the need for further implementing legislation and that secondary legislation made under section 2(2) of the 1972 Act – which would include UK statutory instruments implementing EU copyright-related directives[1] – are preserved on and after exit day. The Secretary of State is also empowered to deal with deficiencies in retained EU law arising as a result of the UK's withdrawal from the EU. The reality is that on exit day UK copyright law would not change dramatically. However, because the supremacy of EU law will no longer operate, the UK Parliament would be in a position to repeal or amend elements of that 'retained' law as it sees fit. So in the medium to long term, it is conceivable that some more substantive change may happen.

International copyright conventions, treaties & agreements

Leaving aside for the moment the terms of both the separation and the future relationship, one certainty is that the various international instruments relevant to copyright to which the UK is a signatory will remain unaffected, thus ensuring that the UK is required to continue to abide by the substantive minima of protection prescribed in those instruments. These include the Berne Convention, Rome Convention, TRIPS Agreement, WIPO Copyright Treaty, and WIPO Performances and Phonograms Treaty.

The UK has also signed but not yet ratified the Beijing Treaty on Audiovisual Performances and the Marrakesh VIP Treaty – the UK intends to ratify the latter but this will not take place before exit day.

Pending copyright legislation

There are two significant copyright-related proposals pending in the context of the European Commission's Digital Single Market strategy.

Firstly, there is the proposed directive on Copyright in the Digital Single Market, which includes the much debated press publishers' right for digital uses and similarly controversial obligations on platforms which effectively require them to deploy filtering technology. If the transition period in the Withdrawal Agreement is confirmed and the (anticipated 12 month) period for implementing the directive does not extend beyond the transition period, then the UK would be required to implement it.

Secondly, there is the proposed regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes. If the regulation is finalised and becomes directly applicable in the transition period, it will form part of UK law.

Conversely, if the UK fails to reach a deal with the EU by exit or does not reach agreement on a transition period, it would not be required to implement the directive and the regulation would not be directly applicable in the UK.

Copyright case law of the CJEU

Under the Withdrawal Act, the 'pre-exit' copyright case law of the CJEU is to be accorded the same binding/precedent status as decisions of the UK Supreme Court. Conversely, the 'post-exit' copyright case law of the CJEU is not binding in the UK.

From a practical perspective, the position in unlikely to be quite so binary. There are several reasons why the UK courts may continue to pay close attention to copyright case law of the CJEU. In particular:

- While the UK Supreme Court would, following exit day, no longer be bound by the supremacy of EU law, it would be required to apply the same test for departing from an earlier CJEU decision as it would in departing from its own case law and is unlikely to do so lightly.
- Absent there having been any changes to the underlying substantive copyright law in issue before it, a UK court may have little incentive to depart from the CJEU's copyright case law (although it is possible to envisage some judges taking a more proactive approach in relation to some areas, such as the communication to the public right where CJEU case law has been inconsistent).
- Insofar as the UK wishes to remain aligned with the EU, in the sense of being part of an economic trading area, there may be an inclination to keep the UK's copyright jurisprudence broadly aligned with that of the EU.
- The Withdrawal Act makes it clear that the UK courts remain free to have regard to anything done on or after exit day by the CJEU or other EU entity so far as it is relevant to a matter before it.

Of course, references to the CJEU for preliminary rulings on points of EU copyright law would no longer be possible for UK courts after exit day.

Exhaustion of copyright

Article 61 of the Withdrawal Agreement on exhaustion of intellectual property rights applies to copyright as it does other intellectual property rights. This would mean that the status quo would be maintained up to the end of the transition period: copyright exhausted in the EU and UK prior to the end of the transition period would remain exhausted within the EU and UK.

The medium to long-term approach of the UK to exhaustion of copyright (and intellectual property rights more generally) is likely to take its lead from the shape of any future trading relationship between the UK and the EU. Presently, the UK Government is undertaking a research program to inform its future strategy on exhaustion. It is possible that it will revert to a regime of 'international exhaustion', at least in relation to goods having been placed on the market outside of the EEA by or with the consent of the copyright holder.

The Department for Business, Energy & Industrial Strategy has issued a Technical Notice on exhaustion of intellectual property rights in the absence of a deal being reached. In simple terms, it would mean that the UK would continue to receive parallel imports from the EEA but there may be restrictions on the parallel import of goods from the UK to the EEA if the destination country within the EEA does not consider the intellectual property right to have been exhausted by having been placed on the market in the UK by or with the consent of the rightholder. The Secretary of State has also issued a draft Statutory Instrument for the eventuality of a no-deal scenario which also adopts this 'one-way street'.

No deal consequences

As exit day approaches, and with political consensus within the UK around the separation arrangements in a state of flux, the prospect of 'no deal' being reached has come into sharp relief. The consequences of a no-deal scenario for copyright may, however, be less pronounced than for other intellectual property rights as much of it is rooted in domestic law or derived from harmonising EU directives that would be preserved under the Withdrawal Act.

There would, however, be some effects in relation to cross-border aspects of copyright. In anticipation of the possibility of a no-deal scenario, the Department for Business, Energy & Industrial Strategy issued a series of technical notices, including the one mentioned above and also one describing some of the consequences of a no-deal scenario from a cross-border copyright perspective. It is a rather disparate list which highlights the practical difficulties that UK consumers and businesses could face. Notably:

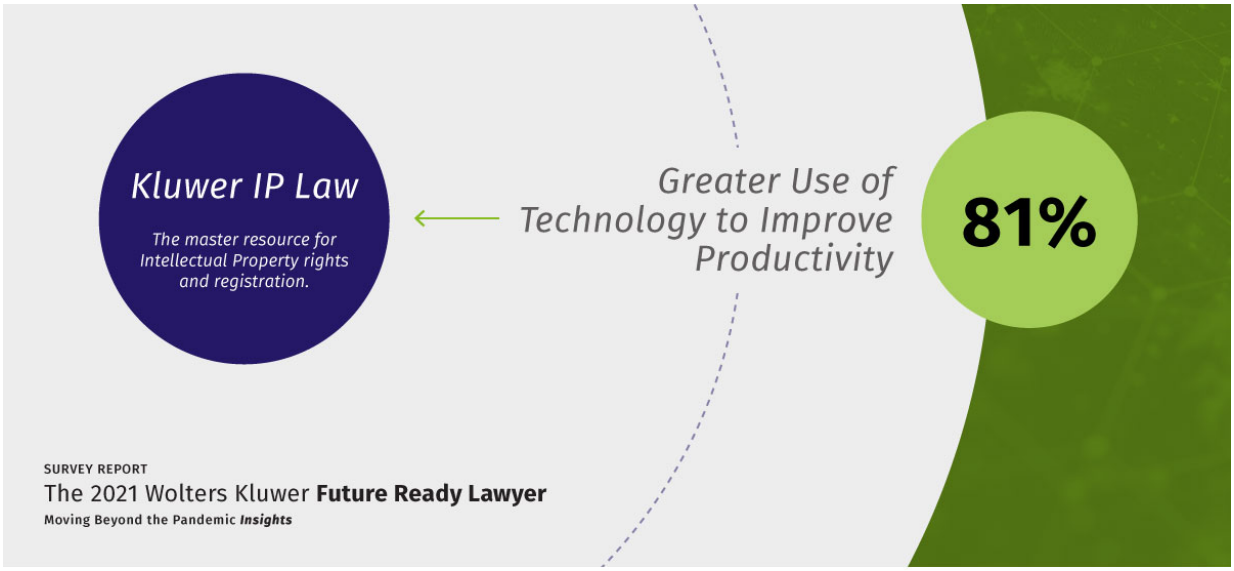
- There would be no obligation on EEA states to provide *sui generis* database rights to UK nationals, residents and businesses and UK database rights may be unenforceable in the EEA meaning it would be necessary to rely on database copyright and, more likely, contractual restrictions instead in the EEA.
- The Portability Regulation would cease to apply to UK nationals in the EU, meaning that UK consumers would be more likely to see restrictions to their online content

services when temporarily in the EU.
- UK-based satellite broadcasters that presently rely on the country-of-origin clearance rule for EEA broadcasts may have to obtain clearance in each EU Member State.
- Institutions that rely on the orphan works exception and that make works available online in the EEA may infringe copyright and therefore may need to introduce geo-blocking to reduce infringement risk.
- UK Collective Management Organisations ("CMOs") would not be able to mandate EEA CMOs to provide multi-territorial licensing of online rights. Instead, such UK CMOs might need to enter into contracts to continue doing so.

Conclusion

This short commentary sets out, at the time of writing, the position in relation to UK copyright following Brexit. That position will require careful monitoring, particularly in light of the political uncertainty around the separation arrangements and future relationship between the UK and EU. The Brexit divorce remains an ever changing unknown at this stage.

[1] This might include UK implementing legislation for any of the following: InfoSoc Directive; Rental and Lending Directive; Resale Right Directive; Satellite and Cable Directive; Software Directive; Term Directive; Orphan Works Directive; Collective Rights Management Directive; Directive implementing Marrakech Treaty; Database Directive; Enforcement Directive; Ecommerce Directive; Conditional Access Directive.



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