

Copyright and Brexit: an update

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In December, we set out our views on what would happen to copyright in the UK following Brexit – see [here](#). This blog is intended to provide an update in light of more recent events.



On 15 January 2019, the House of Commons voted to reject the draft Withdrawal Agreement. The Withdrawal Agreement had provided for a "transition period" from the date of exit (which was 29 March 2019 at that time) to 31 December 2020, during which EU law would continue to apply to the UK and the UK Government would seek to negotiate the terms of its future relationship with the EU within the framework set out in the Political Declaration. Practically speaking, this would have meant that the UK would formally exit the EU on 29 March 2019, but substantively on 31 December 2020.

However, exit day has now been postponed twice: first to 12 April 2019 after the House of Commons rejected the Withdrawal Agreement once more; and then again, on 10 April 2019, when the UK Government and the EU agreed to the current exit day of 31 October 2019. The political uncertainty surrounding the Brexit negotiations also means that the prospect of no deal being agreed prior to 31 October remains a distinct possibility, with no transition period and with exit occurring on 31 October.

If the Government is able to negotiate a deal, we expect that, in common with the rejected Withdrawal Agreement, it would contain very little provision for copyright. We previously referred to a [series of technical notices](#) issued by The Department for Business, Energy & Industrial Strategy which expressed the Government's intentions in relation to various fields of intellectual property in the event that no deal is concluded, including one addressing copyright. The technical notices have been widely disseminated and published on the UK IPO website in order to allow businesses to prepare for a no deal Brexit. While the technical notices are not legal instruments, it would be politically very damaging for the Government to resile from the position stated in them and in any event many of them have already been augmented by statutory instruments which will commence on exit day, assuming nothing to the contrary is agreed.

One of these statutory instruments is [The Intellectual Property \(Copyright and Related Rights\) \(Amendment\) \(EU Exit\) Regulations 2019](#), which was signed on 19 March 2019. The following are some of the main copyright-related effects these regulations would have:

- *Orphan works* – cultural institutions in the UK will no longer be able to rely on certain 'permitted uses' in order to copy orphan works for the purposes of digitisation, making them available (on their websites) in the EEA, indexing, cataloguing, preservation or restoration. These institutions could still utilise the UK's Orphan Works Licensing Scheme, but this only extends to the UK and they may therefore have to implement geo-blocking to reduce the risk of infringement in the EEA.
- *Collective Rights Management Organisations (CMOs)* – UK CMOs will no longer be entitled to mandate EEA CMOs to provide multi-territorial licences of their online music repertoire. (Presently, under The Collective Management of Copyright (EU Directive) Regulations 2016, EEA CMOs who offer multi-territorial licences for online music can be mandated by other EEA CMOs who do not offer such licences to include their repertoire in their licence). UK CMOs would therefore have to enter into separate contracts to continue operating in the same way in the EEA.
- *Online portability* – The Portability of Online Content Services Regulations 2018 will be revoked and as such online content service providers will no longer have to provide cross-border access for UK consumers, so UK consumers may no longer be able to easily access their online services when temporarily in another Member State.
- *Artists resale rights* – The Artist's Resale Right Regulations 2006 will be amended and there will no longer be automatic UK resale right protection for EEA nationals. However, UK nationals and those of other Berne Convention countries who recognise resale rights of UK nationals will continue to receive such protection in accordance with The Berne Convention.
- *Satellite broadcasting* – The Copyright Designs and Patents Act 1988 will be amended so that UK-based satellite broadcasters that presently rely on the country-of-origin clearance rule for EEA broadcasts may have to obtain copyright clearances in each of the remaining 27 EU Member States to continue with their activities in those locations.

The proposed Directive on Copyright in the Digital Single Market was finally agreed and formally signed on 17 April 2019, published in the Official Journal on 17 May 2019 and enters into force on 7 June 2019. The UK Government will have until 7 June 2021 to transpose the directive into national law. Whether the UK will be required to do so will depend on when it leaves the EU and what deal (if any) is negotiated. Notably, the UK supported the Directive in the final vote before the Council of the EU, but, if it is not required to implement the Directive, it could decide to take a different position on any or all of the Directive's provisions.

The proposed regulation laying down rules on online transmissions of broadcasting organisations and retransmissions of television and radio programmes (intended to facilitate rights clearance for ancillary online services – such as simulcasting or 'catch up' TV – by broadcasters and facilitate digital retransmissions over closed networks of TV and radio programmes originating in other Member States) has since been redrafted as a directive rather than a regulation. This directive has been adopted and signed and, once published in the Official Journal, Member States will have 2 years in which to transpose the directive into national law. Again, the extent to which the UK implements this directive remains to be seen. The directive requires, among other things, the UK to introduce a 'country of origin' principle for ancillary online services but clearly this is unlikely to be feasible where the UK is no longer part of the EU.

In conclusion, beyond the main changes outlined above, there is unlikely to be any further substantive change to copyright law in the UK, at least in the short to medium term following exit. In addition, the pre-exit copyright case law of the CJEU would continue to be binding on the UK courts unless ultimately departed from by the Supreme Court.

This update sets out the position at the time of writing but, as before, it will continue to require careful monitoring with the ongoing uncertainties surrounding both the separation arrangements and the future relationship between the UK and the EU.