Kluwer Copyright Blog

So what does BREXIT mean for copyright (and database rights) in the UK?

Theo Savvides (Bristows LLP) · Tuesday, July 5th, 2016

BREXIT will obviously have an impact on some of the intellectual property regimes the UK will operate under in the post-EU world, but will it have a significant impact on the copyright regime in the UK?

Copyright is probably the intellectual property right that is the least harmonised in the EU. There have been attempts to harmonise aspects of it, such as the Software Directive, the Database Directive and the Information Society Directive. However, there are still significant differences between member states in both the black letter law of individual states' copyright law and their application of the harmonised aspects of copyright law. This manifests itself in such things as the standard required for copyright to subsist in relation to non-harmonised copyright works (whether it be originality, intellectual creation or some other standard), moral rights (which are of greater importance in some states than others) or assessing infringement.
In the immediate aftermath of the UK's exit from the EU it does not seem likely that the UK will make significant changes to its copyright law – even those aspects which have been introduced as a result of EU legislation. The temptation is therefore to say that Brexit will not make much difference to UK copyright law. The medium to long term reality is a little more nuanced than that, however, and ultimately is likely to depend upon the deal the UK does with the EU post-Brexit. Based on the current levels of trading relationship the EU enters into, the UK's options for an ongoing trading relationship with the EU are as follows:

1. Full EU membership – requiring a British government rejection of the recent referendum result;
2. The Norwegian model – the UK becoming a part of the European Economic Area;
3. The Swiss model – the UK becoming a part of the European Free Trade Association;
4. The Canadian model – a bilateral agreement between the EU and the UK;
5. The WTO model – the UK trades with the EU under World Trade Organisation rules (the default option if no agreement can be reached between the UK and EU).

Under the Norwegian model, the UK will retain EU copyright law including any legislation that is introduced in the future. However, as you work down this list, the scope for the UK and EU's copyright laws to diverge increases, and with that increasing scope comes a greater likelihood that they will diverge. This divergence will undoubtedly be driven by existing and further disruption caused by digital technologies.

Over the last ten years the UK government has had a number of reviews of its copyright laws and

the increasingly digital environment in which those laws operate – see the Gowers Review of Intellectual Property (here), the Digital Britain Report (here) and the Hargreaves Review of Intellectual Property and Growth (here). However, in every case the extent of the legislation that the UK government has been able to introduce has been limited by existing European legislation in the areas it wanted to reform. It seems likely, therefore, that further reform will be implemented in the event that the UK government has the freedom to do so.

On the other side, the European Commission has made no secret of its desire to substantively reform and harmonise Copyright law across the EU under its Digital Single Market strategy. In the short term, and with the odd exception (the mooted Newspaper publisher's right for instance), these changes are likely to be fairly limited. However, the European Commission has made clear that in the long term it would like to implement a single EU-wide copyright title under a single harmonised law, with a single EU-wide Court jurisdiction.

Another aspect of the Digital Single Market strategy that could have some bearing here is the European Commission's consultation on the Enforcement Directive. The English Courts have been at the forefront of implementing some of the novel remedies made available as a result of the Enforcement Directive which have made a significant difference in enforcing copyright online (eg Siteblocking Orders under Newzbin 2 – see first instance judgment here). Depending on timing of Brexit, it is possible that the UK may miss out on any changes to the Enforcement Directive as a result of the European Commission's consultation.

With the exception of the possible move to a single copyright jurisdiction that the European Commission has mooted (whilst accepting that politically it may be some way off), it may be that divergence is not as great as first thought, however. The reality is that in considering any reform, the UK is likely to take into account changes that the EU makes and possibly adopt those aspects that it sees as successful (and vice versa).

Post Script – A word about database rights.

The sui generis database right is a uniquely European intellectual property right – a product of the European Commission's imagination. As a result it is only available to EEA nationals and nationals of those countries who by specific legislation the EU recognises as providing reciprocal protection (of which this writer is not aware of any off the top of his head). The status of the database right in the UK (in terms of being enforceable across the EU) is unlikely to be affected if it becomes a member of the EEA post Brexit. However, outside this arrangement, the UK will need specific legislation for UK nationals' database rights to be recognised in the EU.

In the event that the UK leaves its database rights legislation unchanged, this should be something that can be negotiated under the terms of Brexit (assuming it makes it onto the UK negotiators' to do list). However, the success of the database rights legislation has been held back by a complex legislation which has left a cloud of uncertainty over the subsistence and scope of the sui generis right. In these circumstances the question will be whether the UK government will be able to resist the temptation to clarify its scope or even revert back to a wider scope of copyright protection for databases. If they choose to do this, it may need to sacrifice the reciprocal protection UK businesses who invest in databases can currently expect in the European Union.

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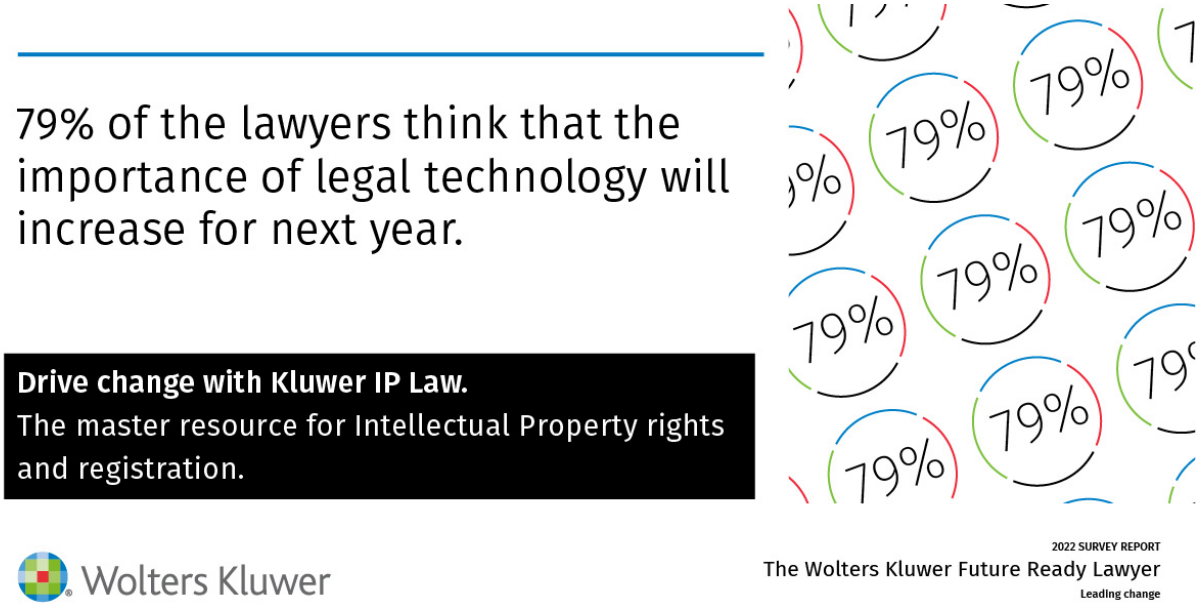

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