Kluwer Copyright Blog

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

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As discussed in this blog post, the impact which Brexit has on the UK's copyright regime will largely depend on the exact form that Brexit takes.

Whilst copyright has remained far less harmonised across EU member states than other IP rights, one aspect of UK law which has been affected by the EU is the originality threshold required for copyright to subsist in databases and (arguably) in literary, dramatic, musical and artistic works.

This article considers the impact that the EU (and in particular the *Infopaq* decision of the CJEU) has had on the threshold for copyright protection in the UK, and whether the UK might revert to a different threshold once the UK leaves the EU.

What role does 'originality' play in assessing whether copyright subsists?

Within the EU, the threshold for assessing whether copyright subsists in a particular work is generally not harmonised (although there are some notable exceptions).

In the UK, the originality threshold has traditionally been a low one. Literary, dramatic, musical and artistic works have to be 'original' (s.1(1)(a) of the Copyright Designs and Patents Act 1988) for copyright to subsist and a work has, historically, been deemed sufficiently original by English courts if it originated with the author who is claiming copyright protection and it was the result of the application of their "labour, skill or effort".

In continental European countries, a literary, dramatic, musical or artistic work must generally possess a creative element, or in some way express its author's personality to be protected by copyright (although any assessment as to the quality or the "artistic" nature of the work is excluded).

This continental European approach to assessing originality has been introduced into EU law and thereby into UK law in Directive 96/9/EC on the Legal Protection of Databases. This provides that, across the EU, *"databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright"* (emphasis added). The 'author's own intellectual creation' test is transposed into English law by s.3A of the Copyright Designs and Patents Act 1988, which specifies the relevant originality threshold for copyright protection in databases in the UK.

Meanwhile, the two approaches were combined in the Software Directive (91/250/EEC) which required under Article 1(3) the protection of computer programs *"if [they are] original in the sense that [they are] the author's own intellectual creation"*. Whilst the concept of intellectual creation was a consistent theme in the recitals of the Information Society Directive (2001/29/EC).

Did the CJEU's decision in *Infopaq* raise the threshold of originality for copyright to subsist in literary, dramatic, musical or artistic works?

The CJEU further developed the concept of an 'author's own intellectual creation' in its decision in *Infopaq*. In that decision, the CJEU held that the reproduction of 11-word extracts from newspaper articles amounted to reproduction of a copyright work if the elements which were reproduced were the expression of the author's intellectual creation.

Since *Infopaq*, the English courts have taken differing approaches to the question of whether the CJEU's decision in *Infopaq* has raised the originality threshold under English law:

- In 2011, the Court of Appeal in *Meltwater* took the view that *Infopaq* made little or no difference: *"Although the Court refers to an 'intellectual creation' it does so in the context … which clearly relates such creation to the question of origin not novelty or merit. Accordingly, I do not understand the decision of the European Court of Justice in Infopaq to have qualified the long standing test established by* [University of London Press v University Tutorial Press and Ladbroke v William Hill, which establish that 'original' does not connote novelty, simply that a work originated from the author]".
- Other judges have not been so definitive and have preferred to conflate the tests. For example in *Temple Island Collections* HHJ Birss (as he then was) confirmed his view that the work in question was sufficiently original by reference to *"the expression of the skill and labour exercised by [the author], or in Infopaq terms, [the author's] intellectual creation."*
- In 2013, the Court of Appeal in *SAS Institute v World Programming Limited* suggested that *Infopaq* may have changed the traditional English test. Lord Justice Lewison, giving the leading judgment, said that *"If the Information Society Directive has changed the traditional domestic test, it seems to me that it has raised rather than lowered the hurdle to obtaining copyright protection."*

Will English courts revert to the pre-*Infopaq* test after Brexit?

In time, English judges may be inclined to revert to assessing originality on the basis of "labour, skill or effort" once the UK leaves the EU.

However, there are two key factors which might result in the continental European approach to originality enduring for some time:

- The ‘author’s own intellectual creation’ test will remain the threshold for originality in databases (unless s.3A of the CDPA is repealed or amended).
- The government announced in October that it intends to introduce a ‘Great Repeal Bill’ which would come into force when the UK leaves the EU, and on that date incorporate all currently applicable EU law into domestic UK legislation. This would mean that, in time, each piece of ‘EU’ legislation could be retained, amended or repealed at the government’s leisure. Whilst legislation derived from the EU remains on the UK’s statute book, it will be tempting for English judges to assess originality in line with CJEU jurisprudence, and the English case law which has been shaped by it.

Set against these two factors is the greater freedom which the English judiciary will gain 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.

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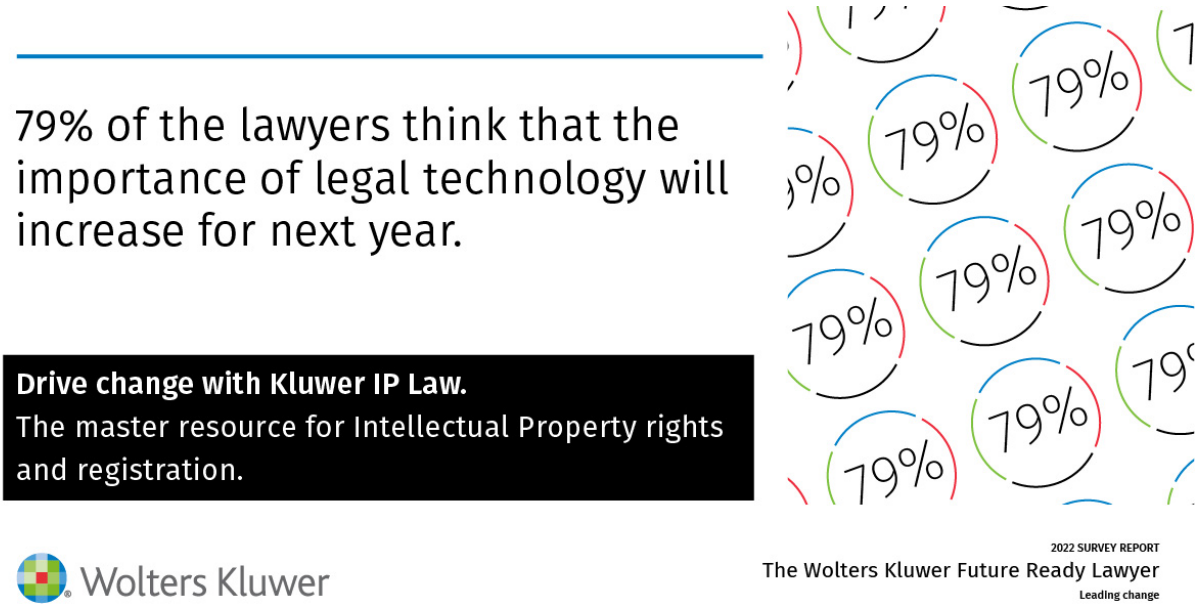

This entry was posted on Monday, December 5th, 2016 at 4:43 pm and is filed under Britain' and '**ex**it' and refers to the UK leaving the European Union (EU). A referendum – a vote in which everyone (or nearly everyone) of voting age can take part – was held on 23 June 2016, to decide whether the UK should leave or remain in the EU. Leave won by 51.9% to 48.1%. Britain's departure from the EU is scheduled to take place at 11pm UK time on 29 March 2019.">Brexit, inter alia, for ensuring that EU law is interpreted and applied in a consistent way in all EU countries. If a national court is in doubt about the interpretation or validity of an EU law, it can ask the Court for clarification. The same mechanism can be used to determine whether a national law or practice is compatible with EU law. The CJEU also resolves legal disputes between national governments and EU institutions, and can take action against EU institutions on behalf of individuals, companies or organisations.">CJEU, European Union, Legislative process, Originality, United Kingdom
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