Kluwer Copyright Blog

Regulatory divergence post Brexit: Copyright law as an indicator for what is to come

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Here we have it. The first instance of regulatory divergence. The UK is leaving the European Union, and already the rules of the single market are starting to break.

In response to a parliamentary question by Labour MP Jo Stevens, Intellectual Property Minister Chris Skidmore said on 21 January that the UK Government had no intention of implementing the EU Copyright Directive, for which the UK Government had voted in the EU Council in spring 2019. There was significant dissent among EU Member States and the Directive would not have been adopted without the UK's support.

Does this matter? Copyright law may not be what people expected to be the first post-Brexit regulatory fault line. The public debate has been dominated by standards for labour, the environment, public subsidies and taxation, where the EU's concern is regulatory dumping. Yet Brexiteers have said many times that leaving the EU only makes sense if it leads to the UK becoming a more attractive destination for business. This means entering into a process of regulatory competition with its closest neighbouring market. So it is advisable to pay close attention to how this negotiation will play out. And copyright law is where the choices start.

Let's consider the parliamentary exchange in the House of Commons in full:

On 16 January 2020, a written question was asked by Jo Stevens, Labour MP for Cardiff, headed "Copyright: EU Action" (4371):

"*To ask the Secretary of State for Business, Energy and Industrial Strategy, what plans the Government has to bring forward legislative proposals to implement the EU Copyright Directive in UK law.*"

Chris Skidmore, Minister of State for Universities, Science, Research and Innovation (which includes responsibility for intellectual property) answered on 21 January 2020:

"*The deadline for implementing the EU Copyright Directive is 7 June 2021. The United Kingdom will leave the European Union on 31 January 2020 and the Implementation Period will end on 31 December 2020. The Government has committed not to extend the Implementation Period. Therefore, the United Kingdom will not be required to implement the Directive, and the Government has no plans to do so. Any future changes to the UK copyright framework will be considered as part of the usual domestic policy process.*"

Which future domestic policies may diverge from the aims of the Directive? The Directive on Copyright in the Digital Single Market contains three different groups of measures.

The first group harmonises a number of copyright exceptions affecting cross-border uses. New provisions also make it easier to use out-of-commerce works (Article 8) and ensure that works of visual art that have reached the end of their copyright term remain in the public domain (Article 14). This first group of provisions modestly benefits cultural heritage, educational and research institutions.

The second group of interventions seeks to improve the contractual position of authors and performers. A general fair remuneration principle is established, and greater transparency of royalty statements encouraged. Article 22 also gives authors and performers a new right to revoke a licence or transfer of rights where there is a lack of exploitation. These new contractual regulations could be considered a challenge to common law principles of freedom of contract, but they lack teeth. While they have been widely welcomed by creators, routes to enforcement remain unclear. Again, there is no obvious alternative policy path.

The third group of measures is much more controversial. They are introduced in the Directive under the innocuous sounding label of "Measures to achieve a well-functioning marketplace for copyright". The headline intervention is a change to the liability regime of platforms that host user-uploaded content. Article 17 (formerly 13) creates a new category of 'online content sharing service provider' that will no longer benefit from the 'safe harbour' of the e-Commerce Directive, a core piece of internet legislation adopted in the year 2000. The e-Commerce Directive exempts platforms from liability for unlawful content found on their services (if removed "expeditiously" following notice).

In the polarised debate of the Copyright Directive, Article 17 was pushed as a decisive industrial policy measure that would enable the music industry to improve licensing deals and revenue sharing offered by Google's YouTube service. In an effective trope coined by the UK music industry, Article 17 was to close the "value gap" between European creators and US technology giants. Opponents characterised the measure as a "censorship law" that would lead to the default use of upload filters and the disappearance of "memes" (because they re-use identifiable copyrighted materials).

A typical exchange between the two sides of the debate can be found in these letters published by the Financial Times (paywalled) during the final stages of the legislative process: Julia Reda: State-

of-the-art copyright filters threaten freedom of expression; Michael Grade: Copyright reform will put an end to this freeloading. Recent evaluations of the Copyright Directive can be found here and here.

Boris Johnson (then out of government) had tweeted near the end phase of the European legislative process on 27 March 2019: “The EU’s new copyright law is terrible for the internet. It’s a classic EU law to help the rich and powerful, and we should not apply it. It is a good example of how we can take back control”.

On the balance of evidence analysed by independent experts (to which I contributed), the Prime Minister seems to be correct. The industrial policy measures of the Copyright Directive will have numerous unintended consequences beyond the music sector, and will make market entry and user-led innovation harder.

So, has the UK suddenly seen the light? Does evidence matter? Are we observing the emergence of a coherent policy addressing the creative industries?

There is a possibility that the UK acted cynically, supporting the Directive in the European policy making process in the anticipation that it would damage the economy of the EU’s digital single market. This suspicion is implied by the outrage felt towards the UK’s policy U-turn last week. More likely, the UK civil service just kept their heads down during the copyright negotiations. They may not have wanted to draw attention at a moment of sensitivity over the Withdrawal Agreement. And perhaps the UK’s politicians were distracted. But this position will not do for much longer.

Post Brexit, regulatory divergence on copyright will not simply be a matter of domestic policy choice, as implied by the ministerial answer. Critically, it will depend on what new trade arrangements look like. Keeping a safe harbour for content sharing platforms in place may attract tech firms to set up in the UK. Yet there is also an agenda targeting the major digital platforms. The UK government is already committing to impose a “duty of care” liability (Queen’s Speech of 19 December: “My Ministers will develop legislation to improve internet safety for all [Online Harms Bill].” The government also says it will continue to pursue a Digital Services tax.

It is already clear that these platform measures cannot be insulated from wider Free Trade Agreements (FTAs) sought with both the EU and the US. In addition, looking at past FTAs negotiated by the US, there is a track record of taking aggressive intellectual property positions. For example, in 2004 Australia was unable to shelter its drug price control scheme (Pharmaceutical Benefits Scheme PBS) from significant change, and conceded increased intellectual property standards.

When studying the UK’s options as they affect culture and the creative industries, independent evidence on raising or decreasing obligations of platforms (with or without intellectual property dimensions) will be critical. There is an urgent need to develop a more coherent framework as trade negotiations begin in earnest. The AHRC funded Creative Industries Policy & Evidence Centre (PEC) is already studying the UK’s international competitive position. In this context, Prof. Philip Schlesinger and I are in the process of mapping the regulatory landscape for online platforms.

The legitimacy of governments is increasingly in doubt. The Brexit process itself is a challenge to established procedural principles that lend legitimacy to a ruling power. Legitimacy requires that a

government can explain the reasons for its actions.

The UK Government needs to be held to this standard. We need to know on what basis, and for what aims and purposes, the UK intends to regulate contested norms, such as the liability of platforms under copyright law. Why does the UK wish to diverge? Just to signal that it is taking a different stance? Or is there actually a game-plan? Answers are needed before we enter into trade negotiations that will then fundamentally shape "domestic choices".

This post has also been published on the EU Law Analysis Blog at http://eulawanalysis.blogspot.com/.

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‘**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, CDSM Directive, Digital Single Market, European Union, Legislative process, United Kingdom