Kluwer Copyright Blog

The Impact of REULA on Copyright Law: Navigating the Post-Brexit Landscape

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The Retained EU Law (Revocation and Reform) Act 2023 (REULA) came into force on 1 January 2024 and has some significant implications for IP law. Much IP law in the UK is derived from EU law – both implemented EU law and case law decided in view of EU law. REULA could impact all of the above.

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Abolition of supremacy

The main effect of REULA is, no doubt, the abolition of the supremacy (section 3) and general principles (section 4) of EU law in the UK. This includes the "*indirect effect*", which is a principle of EU law, whereby national courts of the member states of the EU are required to interpret national law in line with provisions of EU law.

Under REULA, the supremacy of EU law within the UK legal system has been flipped. From 1 January 2024 "*any provision of retained direct EU legislation must, so far as possible, be read and given effect in a way which is compatible with all domestic enactments, and is subject to all domestic enactments, so far as it is incompatible with them*" (section 3 A2).

Nonetheless, while EU law no longer holds the paramount status it once did, it still retains

relevance as contextual aid in the interpretation of domestic legislation. HHJ Tindal clearly expressed this view in *E-Accounting Solutions v Global Infosys*, where he explicated that an EU directive leading to domestic legislation can be seen as a form of "*external aid*" to its interpretation.

REULA necessitates a nuanced approach to the interpretation and application of statutory provisions. While UK courts are no longer bound by the rulings of the CJEU, the body of case law and principles developed under EU regulations and directives remain a valuable resource for guiding statutory interpretation.

Effectively, REULA allows "*higher courts*" (meaning the Supreme Court, the relevant appeal court, and, in limited circumstances, the High Court of Justiciary) to depart from the retained EU case law (or "*assimilated EU case law*" as it is now to be known) as well as their own retained domestic case law if they consider it right to do so, having regard to the tests set out in section 6. Although the lower courts are still bound by the decisions of the higher courts and their precedents set in light of EU law, they may refer the points of law to certain higher courts under section 6A.

REULA's influence on copyright law

Although EU law had a strong influence on the UK copyright law, the two were never properly aligned. Copyright in the UK protects a closed list of works, which never conformed with the EU law's open-ended approach, suggesting that copyright protection arises in respect of any work falling within the scope of Berne Convention and the InfoSoc directive, which is its "*author's own intellectual creation*" (as confirmed in *Infopaq* in 2009).

Originality

The "*author's own intellectual creation*" appears in the Copyright Designs and Patents Act 1988 (CDPA) only in section 3A, which specifies the relevant originality threshold for copyright protection in databases in the UK. Arguably, the decision in *Infopaq* has raised the UK's previous "*skill and labour*" originality threshold. Since *Infopaq*, the UK courts have been consistently applying the "*author's own intellectual creation*" test, thus harmonising the law in this one aspect.

Under REULA, the cessation of EU supremacy opens the door to the return of domestic principles of originality. Judges of the higher courts may revert to pre-CDPA "*skill and labour*" test when determining originality of works protected by copyright.

In the recent Court of Appeal judgment on *THJ v Sheridan*, prior to the implementation of REULA, LJ Arnold confirmed the test for originality was in line with CJEU rulings (see more here). When considering whether this case could have been decided differently if it was brought in 2024, Arnold LJ did not indicate that he would have ruled otherwise.

Therefore, whether the higher courts choose to revert to the UK's previous originality test remains to be seen. Judges must navigate the tension between domestic legislation and EU case law, balancing the need for legal continuity with the new imperative to uphold the sovereignty of UK law.

Artistic craftsmanship

As discussed above, copyright protection in the UK covers only a restrictive list of works. "*Artistic works*" must conform to predefined categories outlined in section 4(1) of the CDPA:

1. a graphic work, photograph, sculpture, or collage, irrespective of artistic quality,
2. a work of architecture being a building or a model for a building, or
3. a work of artistic craftsmanship.

At the same time, the CJEU in *Cofemel* and *Brompton* confirmed that the main requirement for a design to qualify for copyright protection in the EU was originality, meaning "*author's own intellectual creation*".

UK law requires a higher bar for works of "*artistic craftsmanship*". Originality alone is not enough and what constitutes "*artistic craftsmanship*" is still somewhat unclear, as case law interpretation varies.

The pre-*Cofemel* precedents generally required both, artistic (aesthetic) appeal and elements of craftsmanship, to attract copyright protection.

In 2020, HHJ Hacon in *Edinburgh Woolen Mill* held that the term "*artistic craftsmanship*" does not require an assessment of aesthetic appeal in order for copyright protection to arise.

In the unsuccessful 2022 summary judgment in *WaterRower* Judge David Stone held that he could not conclude, based on the evidence before him, that the WaterRower was **not** a work of "*craftsmanship*", since there was evidence that the creator was a craftsman. The judge also said the work could be artistic under *Hensher* (see more here).

To conclude, what qualifies as "*artistic craftsmanship*" presents a considerable challenge for judges, given the subjective nature of artistic expression and the absence of clear-cut criteria. It is important to remember that ambiguity is where the disputes arise. This lack of clarity could also result in more members of public not enforcing copyright because they are unsure what the law says.

As was recognised by Judge David Stone in *WaterRower*, "*the interaction between the CDPA and Cofemel/Brompton is not a simple one. It is one which would appear to need to be resolved at some stage, by Parliament or the higher courts*". Indeed, Arnold LJ has long been appealing for substantive reform of the UK copyright law, as CDPA is outdated and does not provide the necessary legal clarity.

Key Takeaways

As the legal community grapples with the implications of REULA, several key takeaways emerge.

Firstly, while REULA signals a departure from EU supremacy, it does not entail a wholesale rejection of EU law. EU regulations, directives and case law retain relevance as interpretative aids, shaping the evolution of UK statutory provisions within the confines of domestic legal frameworks.

Secondly, lawyers may attempt arguments advocating for nuanced interpretations or challenging the applicability of case law following EU precedent. Creative legal arguments and contextual considerations will likely be employed to influence judicial decisions and navigate the evolving landscape of copyright law in the UK.

The enactment of REULA has instantly introduced a significant element of uncertainty into the continuing legal practice. Whilst there will be no issue for simple concepts of law after REULA, some more difficult issues (such as the concept of "*artistic craftsmanship*" and the originality test) may be decided differently by the UK courts. In effect, REULA gave a green light to the UK courts to go ahead and depart from assimilated EU case law.

Nonetheless, the lower courts will continue to apply decisions of the higher courts, which are currently largely based on EU law. In turn, the higher courts will continue to use EU law for contextual aid when applying a piece of legislation which was originally designed to implement an EU directive.

Lastly, at least for the near future, outcomes will likely be the same as they were prior to the implementation of REULA. Although REULA seems to bring fundamental changes to UK law, these changes are by no means instantaneous. The ability to depart from assimilated EU case law only applies to cases decided after 1 January 2024, and so the old law will continue to apply to disputes involving facts that occurred before this date. However, the changing relationship between domestic legislation and the EU legislation that it was intended to implement has introduced uncertainty and the possibility that individual cases may bring swift and significant changes.

This post was inspired by a UCL event that took place on 26 January titled 'Are you Ready for REULA? The Conscious Uncoupling of UK and EU Intellectual Property Law', chaired by the Rt Hon. Sir Richard Arnold with speakers Dr Ruth Fox, Professor Phillip Johnson, Nina O'Sullivan and His Honour Judge James Tindal, who offered great insight into the potential impact of these changes. The recording of the UCL event is available here and we thoroughly recommend you watch it.

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