

AOP policy update by Florian Koempel, copyright consultant to the British Copyright Council (BCC) www.britishcopyright.org August 2018.

This update is on two current main issues in copyright policy, the impact of Brexit on UK copyright and other relevant European developments for the IPO (it has been written in a personal capacity and does not necessarily reflect any other body's views).

Withdrawal from the European Union and copyright

Before Parliamentary summer recess end of July 2018, the political landscape changed almost on a daily basis with the so-called Chequers deal and subsequent personal changes on the front bench. The reshuffle following Mr Davis' and Mr Johnson's departure meant that Mr Jeremy Wright QC has become Secretary of State for Digital, Culture, Media and also Sport (DCMS), following Matt Hancock's move to the Department of Health and Social Care.

The withdrawal from the European Union is still the focus of political and public discussions in the UK whilst there is limited political and public interest in Germany or France after the initial shock of the Referendum in June 2016. At the time of writing, some 200 days before the departure from the European Union on 29th March 2019, there is no clarity what Brexit will mean other than "Brexit"; this Article will only consider the impact on UK copyright which seems more certain at least for the short to medium term. Ultimately, it depends on what UK Government agrees for the time after the withdrawal date, 29th March 2019. As regards the national copyright framework it is basically up to the UK how to proceed.

In general, the withdrawal from the European Union will only lead to limited changes to the UK copyright framework. The United Kingdom is itself (sometimes in dual membership with the European Union) bound by international copyright agreements providing minimum standards of protection for creators. In particular the Berne Convention 1886, the Agreement on Trade-Related aspects of Intellectual Property Rights 1994 (TRIPS), the WIPO Copyright Treaty 1996 and most recently the WIPO Visually Impaired Persons Treaty 2013 providing an exception for visually impaired people.

The European Union copyright framework provides further protection for creators' works on top of the international minimum standards, e.g. a term of protection of 70 years after the death of the author compared to the 50 years provided in international agreements. Furthermore, the express basis of European Union copyright law is a high level of protection for creators. Politically, it is not expected that the UK government will change UK copyright law which has been introduced by the European Union copyright framework (mainly Directives which EU member countries have to action) in the short to medium term. Given the economic strength of the creative sector (as net exporter) it is in the interest of the UK government to retain strong protection of copyright in the UK as well as its enforcement. According to data from DCMS creative industries as a whole export around £36bn a year in goods and services.

So, whilst UK copyright itself will remain basically unchanged, changes will be required in as far as specific European rules are based on principles of mutual recognition and reciprocity between European Union member states.

For instance the UK Government needs to address the question of 'exhaustion' of copyright. Under the current European Union regime the rights of the rightholder in the physical copy of a work (e.g. a book or game) are limited once put on the market with the consent of the rightholder. The rights holder, amongst others, cannot prevent the resale of the copy of the work; their rights in the work are expired (i.e. "exhausted"). At the moment the rights are exhausted throughout the European Union once the physical copy (for instance of a photograph) is put on the market in the European Union. After the withdrawal from the European Union the UK Government has to choose between 'national' exhaustion i.e. the rights are only exhausted in the UK once put on the market in the UK (which was the position in the UK before the joint the European Union) or 'international' exhaustion, i.e. the rights are exhausted internationally once put on the market in the UK (this is the situation in the United States and Australia for instance). Potentially, works sold internationally could then be reimported and undermine the domestic market.

Other issues which need to be addressed include orphan works, i.e. works where the right holder cannot be identified or located after diligent search; under European Union law once it has been established in one member state that the work in question is an orphan work, this is recognised throughout all European Union member states. Mutual recognition and reciprocity between EU member states are important issues in other creative sectors such as the music industry, e.g. when a licence to use music for a satellite broadcast in one European Union country is valid throughout the European Union; or in the broadcasting sector when it suffices that the broadcaster complies with the regulatory regime in one member state to be able to transmit its programme throughout the European Union. Subject to any arrangement in a future trade deal with the European Union these aspects might lead to changes to the UK copyright framework.

The British Copyright Council provided a detailed analysis accessible via www.britishcopyright.org.

Going forward the main interest of the creative sector relates to how the UK government intends to support the creative industry in free-trade negotiations with the European Union and other countries to avoid tariff or nontariff barriers to trade.

The British Copyright Council continues to work with the relevant UK departments outlining the concerns of the whole creative sector.

European Union - Copyright in the Digital Single Market

At the same time as UK politicians and non-domiciled newspaper owners focus on the withdrawal of the United Kingdom from the European Union, the European Union is discussing various legislative initiatives on copyright for the European Union. For instance the European Union has adopted a Regulation on Portability enabling European Union citizens to access their subscription services, such as Netflix and Spotify, if they are temporarily outside the country in which they have these subscriptions (in force since 1st April 2018). Equally, the European Union provides a joined up approach for visually impaired persons based on a harmonised exception to copyright and a system enabling the cross-border exchange of accessible format copies of works such as books throughout the European Union (coming into force in October 2018). It remains to be seen how the United Kingdom and the rest of the European Union will approach these initiatives after the withdrawal from the European Union.

Additionally, a variety of cases are pending in front of the Court of Justice of the European Union e.g. on the relation of copyright and freedom of expression (Funke Medien NRW GmbH v Federal Republic of Germany Case C-469/17), digital exhaustion (Netherlands Publishers Association v Tom Kabinet BV Case: C-263/18), and the rights of a photographer (Renckhoff v NRW Case C - 261/17).

The main piece of European Union copyright changes is the draft Directive on Copyright in the Digital Single Market which amongst others contains 3 mandatory copyright exceptions for works (on text and data mining, educational institutions, and cultural heritage organisations), a new right for press publishers and a system intended to increase the responsibility of Internet Service Providers like Google and others for the content they carry on their platforms.

For individual authors (and performers) the Directive provides Articles on transparency and contract adjustment (in case the original contractually agreed remuneration for the author and performer is disproportionately low).

The draft Directive is currently being discussed by the relevant European Union institutions, i.e. the European Parliament and the European Council. The time for adoption of this Directive is limited, given that there will be a new European Commission and a new European Parliament in 2019, but I predict that the Directive will be adopted into EU law by March 2019 (still including the UK). It remains to be seen whether the UK will then implement the EU Directive into UK law within 24 months after coming into force in the EU; this depends on the future arrangement with the EU or the general political will.

As part of the adoption process the European Council and the European Parliament have to give a mandate to engage in so-called trilogue discussions on the details of the wording; these will be based on the respective texts by the European Council and the European Parliament (and with the assistance of the European Commission). The European Council granted the mandate to engage in trilogue on 25th May 2018. The Plenary of the European Parliament discussed the report by the Legal Affairs Committee containing the mandate during its session on 4th and 5th July 2018. Some MEPs successfully demanded a “Plenary Check” requiring the Plenary to vote whether to approve or reject the report (simple majority).

A motley crew of organisations, including the tech sector, political groups from the Pirate Party to UKIP and certain parts of academia, have launched vocal campaigns against the Legal Affairs Committee report (and in particular Articles 11 (press publishers right) and 13 (value gap). The Plenary did not give a mandate to enter into trilogue at this stage asking for more time to consider the text of the Legal Affairs Committee report. This means that the Plenary will discuss and vote on whether to grant the mandate to engage in trilogue and other possible amendments. The next Plenary is scheduled for the week starting 10th September 2018 when the whole European Parliament will discuss whether to grant a mandate to engage in trilogue. Onwards and upwards.

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