

Impact of Brexit on UK copyright law

This short briefing assesses the possible impact that the withdrawal of the United Kingdom from the European Union will have on UK copyright law, focusing on the provisions of the Copyright Designs and Patents Act 1988 as amended¹ (the CDPA). This discussion is, of course, subject to the contents of the "Great Repeal Bill" (a bill that will repeal the European Communities Act 1972² and immediately re-enact much or all of the content of EU law into domestic law)³ and future free-trade agreements, which at this point in time are unknown.

This note is intended merely to set out some of the areas where the Government will become free to make changes once the UK ceases to be bound by EU law, in order to aid debate and policy-making. It does not advocate any particular position on those issues.

Summary

The withdrawal from the European Union will not require the UK to change its copyright law, but it might choose to do so once it is no longer bound by the harmonised parameters of the EU copyright "acquis". However, even when the UK is no longer bound by EU law, the UK will still need to adhere to the internationally agreed protection standards, such as the Berne Three-Step Test⁴, as the UK itself is a member of the WIPO Internet Treaties 1996⁵ (dual membership with the European Union), a member of WTO (TRIPS)⁶ since 1995 and the Berne Convention 1886⁷. Generally, the UK will therefore need to continue to maintain a high level of protection for copyright works, but without the requirement to adhere to the EU copyright framework it will be possible for the UK to change the semantics of current detailed provisions. Given the number of copyright reviews in recent years (in particular by Gowers and Hargreaves) followed by substantial changes in 2014 it is not expected that the UK will take advantage of the new-found flexibility and introduce new exceptions that arguably

¹ [The Copyright Designs and Patents Act 1988](#)

² [The European Communities Act 1972](#)

³ [Brexit and the Reciprocity Gap, Phil Sherrell, Bird & Bird LLP](#)

⁴ A test relating to exclusive rights of reproduction, originating from Article 9(2) of 1967 revision of [The Berne Convention](#)

⁵ [The WIPO Copyright Treaty 1996](#) and the [WIPO Performances and Phonogram Treaty 1996](#) are together known as the "Internet Treaties"

⁶ [World Trade Organization \(Trade-Related Aspects of Intellectual Property Rights\) 1994](#) (TRIPS)

⁷ [Berne Convention for the Protection of Literary and Artistic Works 1886](#) (The Berne Convention)

were prevented by EU copyright law, such as a private copying exception without fair compensation⁸ or a more general copyright exception of fair use.

As regards tariffs, even in the absence of a free-trade agreement or any form of customs union, copyright licensing seems not to be subject to tariffs under the WTO trade rules. The same applies for physical products incorporating copyright works such as CDs or DVDs.⁹ Nevertheless, given the scope and extent of the negotiations that need to be had between the UK, the EU and other countries, it is likely that changes to UK copyright law will not feature highly on the agenda of UK policymakers and it will remain to be seen whether, and to what extent, copyright will be addressed in future free-trade agreements.

One of the more difficult points we have had to address is that of the reciprocity gap between the UK and EU countries which may emerge via the Great Repeal Bill and which might leave UK-based media businesses at a significant competitive disadvantage to their EU counterparts. This is likely to be a key focus for media businesses in their engagement with government in the short to medium term.

Also, there is uncertainty regarding how the expected Great Repeal Bill will cover decisions of the CJEU, both those that have been directly applied in UK decisions¹⁰ or those where the reference originated from a Court in another member state¹¹. A further question expected to be covered in the Great Repeal Bill relates to jurisdiction, governing law and recognition and enforcement of judgements in cross border disputes. Whilst this is relevant for the practical application of copyright via contracts and enforcement, it is not directly related to copyright legislation¹².

⁸ Attempted unsuccessfully in recent years: [R on the application of BASCA & otrs v Secretary of State for Business, Innovation and Skills & otrs \[2015\] EWHC 1723 \(Admin\)](#)

⁹ World Trade Organisation's Information Technology Agreement as implemented in the EU by [Regulation 2016/1047 on the tariff and statistical nomenclature and on the Common Customs Tariff](#)

¹⁰ Such as [Football Association Premier League and Others v QC Leisure and Others/ Karen Murphy v Media Protection Services Ltd, Cases C 403/08 and C 429/08](#)

¹¹ Such as [in Società Consortile Fonografici \(SCF\) v Marco Del Corso, Case C 135/10](#)

¹² For an overview we refer to an article in the Bird & Bird Brexit series: [Brexit: Cross-border dispute resolution implications](#)

Detail

I. Subject matter copyright

The UK copyright system, based on a closed list of protected works that are subject to an originality threshold¹³, will not change. It is based on pre-EU UK copyright law (the 1911 Act¹⁴) and it is unlikely that the withdrawal from the EU will justify any changes to this system. With regards the legal test to determinate 'originality', we note that the UK is converging its perspective with the European Union. For example, the EU concept of "author's own intellectual creation"¹⁵ was applied in, amongst others, the UK case *SAS Institute Inc. v World Programming Ltd*¹⁶. But, notwithstanding the evaluation of CJEU decisions in future, we would argue that in this instance such a convergence has become part of the UK jurisdiction and as such it is expected that upon Brexit both concepts, the EU test of "author's own intellectual creation" and the UK test of "skill labour and judgement"¹⁷ will continue to apply when assessing the subsistence of copyright.

Within the UK system, copyright protection will continue to apply for databases, however the sui generis right (s.3A CDPA based on the EU Database Directive¹⁸) could be amended after Brexit if there were political will to do so.

The scope of s.6A CDPA (safeguards in case of certain satellite broadcasts) will have to be changed as it currently refers to the European Economic Area. However, it is noteworthy that a broader solution needs to be found for pan-European satellite broadcasts in order to facilitate the licensing process. We note the existence of the proposed Regulation¹⁹ on satellite and cable (re)transmissions, however it is clear that cable and satellite transmissions are an

¹³ Sections 1 and 3 CDPA

¹⁴ [Copyright Act 1911](#)

¹⁵ Article 1(3) [Council Directive 2009/24/EC on the legal protection of computer programs \(Codified version\) L 111/16](#) (the Software Directive) and Article 6 [Council Directive 2006/116/EC on the term of protection of copyright and certain related rights L 372/12](#) (the Term Directive)

¹⁶ [\[2013\] EWCA Civ 1482](#)

¹⁷ Originating from Lord Reid in [Ladbroke \(Football\) Ltd. v William Hill \(Football\) Ltd \[1964\] 1 All ER 465](#)

¹⁸ [Council Directive 96/9/EC on the legal protection of databases L 77/20](#) (the Database Directive)

¹⁹ Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes [COM\(2016\) 594](#)

area which the UK government will have to address following the withdrawal from the European Union.

In contrast, the European Agreement for the Prevention of Broadcasts transmitted from Stations outside National Territories 1967²⁰ only deals with ships and other floating vessels and might not require a change after the withdrawal from the European Union.

II. Term

The term of copyright is required to be 70 years after the death of the author²¹ at European level, however the international treaties only provide for minimum term of 50 years after the death of the author²². Therefore, following the withdrawal from the European Union, the UK would no longer be bound to 70 years from the death of the author as the term of copyright. Similarly, the term for performers and phonogram producers which has been increased in the amended Term Directive²³ would no longer be mandatory; the internationally binding WIPO Performances and Phonograms Treaty of 1996 provides for a minimum term of 50 years from the fixation of the performance²⁴. UK Government could choose to revert to the minimum requirements required by international agreements.

Similarly, the UK could decide to vary s.10A regarding the calculation of term for works of co-authorship and s.66A CDPA regarding the term of copyright for films (reflected in the exception on assumptions as to expiry of copyright) as both were enacted via EU Directives²⁵ and therefore could be varied after the UK leaves the EU, subject to the political decision of the government.

III. Acts restricted by copyright

UK copyright law provides for the right to or authorise someone else to²⁶:

- Copy the work;
- Communicate the work to the public (e.g. via radio or internet);

²⁰ [European Agreement for the Prevention of Broadcasts transmitted from Stations outside National Territories](#)

²¹ Article 1, the [Term Directive](#)

²² Article 7, [The Berne Convention](#)

²³ amended Term [Directive 2011/77/EU](#)

²⁴ Article 17 WIPO Performances and Phonograms [Treaty](#)

²⁵ The [Council Directive 2011/77/EU](#) amending the Term Directive 2006/116/EC enacted s.10A CDPA and the [Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights](#) enacted s.66A CDPA.

²⁶ S.16 Copyright, Designs and Patents Act 1988

- Make an adaptation of the work;
- Perform, show or play the work in public;
- Issue copies of the work to the public; and
- Rent or lend the work to the public.

The acts restricted by copyright have been harmonised at EU level in various Directives; most notably the rights of reproduction²⁷, communication to the public²⁸, distribution²⁹, and rental and lending³⁰. Whilst some of the details of the rights at UK level are based on the implementation of the respective Directives, the rights in their current form are also part of the international copyright framework, in particular the WIPO Internet Treaties 1996³¹ and the Berne Convention 1886³². Therefore, whilst the semantics of UK legislation could be changed, the government cannot remove the rights themselves. For example the UK government decided to implement the 'communication to the public' right in Sections 18 and 20 CDPA based on the wording of Recital 23 of the Information Society Directive³³³⁴; post-Brexit, the detail of the 'communication to the public right' could be changed based on the WIPO Copyright Treaty³⁵, but the right itself needs to be provided.

The exhaustion rule in s.18 CDPA is another example of a provision which currently refers to the European Economic Area and as such may need to be amended when the UK leaves the European Union. It will be open to the UK government to decide whether the scope of exhaustion rules should remain the EEA, reduce to the UK, or opt for an international exhaustion rule as applied by Switzerland and the US.³⁶

²⁷ Article 2, [Council Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society L 167](#) (the Information Society Directive)

²⁸ Article 3, the [Information Society Directive](#)

²⁹ Article 4, the [Information Society Directive](#)

³⁰ Article 2, [Council Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property L 346](#) (the Rental Directive)

³¹ [The WIPO Copyright Treaty 1996](#) and the [WIPO Performances and Phonogram Treaty 1996](#) are together known as the "Internet Treaties".

³² [The Berne Convention](#)

³³ Recital 23, the [Information Society Directive](#)

³⁴ Note, mistakes in the implementation of directives have led to inconsistencies concerning the definitions of "electronic" and "wireless/wire". [The CDPA provides definitions in s.178](#)

³⁵ [The WIPO Copyright Treaty 1996](#)

³⁶ [International Comparative Legal Guide to: Copyright 2017, Global Legal Group, Bird & Bird LLP](#)

IV. Exceptions

Withdrawal from the European Union enables the UK government to legislate in the area of copyright exceptions without having to comply with the parameters established by the European Directives. By way of example, the UK government could, theoretically, introduce an exception for private copying without fair compensation (which failed in 2014 in view of the parameters of Article 5(2b) Information Society Directive³⁷), or a general fair use style exception, which Prof Hargreaves in his review of copyright in 2011³⁸ stated was impossible to introduce in UK law given the current constraints of EU copyright law.

The existing EU copyright framework only provides one mandatory exception for temporary copies³⁹ whilst the other exceptions are optional. The parameters under which member states can choose to implement any of their exceptions are provided for in articles 5(2) and 5(3) Information Society Directive⁴⁰. We note that the proposed Directive on Copyright in the Digital Single Market⁴¹ provides for three additional mandatory exceptions (text and data mining, educational establishments, and cultural preservation) which might be implemented by the UK government.

Following the review of intellectual property by Prof Hargreaves⁴², the UK has chosen to implement all optional exceptions provided in the Information Society Directive⁴³; thus, it is unlikely that the UK government will choose to limit the exceptions after the withdrawal from the European Union.

Whilst exceptions for the benefit of visually impaired people are based on the Information Society Directive⁴⁴, it is worth noting that the UK will have to include

³⁷ The Copyright and Rights in Performances (Personal Copies for Private use) Regulations 2014 [were quashed after judicial review](#).

³⁸ [Digital Opportunity, A Review of Intellectual Property and Growth, May 2011](#)

³⁹ Article 5(1), the [Information Society Directive](#)

⁴⁰ Article 5(2) and 5(3), the [Information Society Directive](#)

⁴¹ Proposal for a Directive of The European Parliament and of The Council on Copyright in the Digital Single Market [COM\(2016\) 593](#)

⁴² [The Hargreaves Review of Intellectual Property and Growth, Exploring the Flexibilities Available to UK Law](#)

⁴³ The [Information Society Directive](#)

⁴⁴ Article 5(3)(b), the [Information Society Directive](#), from which the UK enacted [The Copyright and Rights in Performances \(Disability\) Regulations 2014](#)

such an exception once it ratifies the WIPO Marrakesh Treaty⁴⁵ notwithstanding European Union membership (see section XI for more detail).

Notably, even after withdrawal the UK government has to comply with the internationally binding Berne Three Step Test⁴⁶ as enshrined in the TRIPS agreement 1994⁴⁷.

In the area of software, sections 50A to 50C CDPA are based on the Software Directive⁴⁸; they could be amended following the withdrawal from the European Union. It is not quite clear what the impact on section 50D CDPA would be (concerning acts permitted in relation to databases).

An interesting point arises regarding section 52 CDPA, which was (belatedly) repealed by the UK in the light of a CJEU decision in 2011⁴⁹. Whether the repeal can be reversed depends on the approach of UK government towards CJEU decisions and whether their effect (in particular decisions on non-UK references) can be retrospectively downgraded. However, this is unlikely.

Section 72 CDPA has been changed ("films" have been removed from its scope) in view of a decision of the CJEU⁵⁰. Whilst in theory this change could be varied at UK level following the withdrawal from the European Union, this is unlikely.

Section 73 CDPA⁵¹ providing for an exception for the reception and re-transmission of wireless broadcast by cable seems to have been based on the Satellite and Cable Directive⁵²; following the withdrawal from the European Union, this section could be varied if there is a political will to do so. Interestingly, Section 73 does not refer to the European Economic Area.

⁴⁵ [Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, 2013](#).

⁴⁶ A test relating to exclusive rights of reproduction, originating from Article 9(2) of 1967 revision of [The Berne Convention](#)

⁴⁷ [World Trade Organization \(Trade-Related Aspects of Intellectual Property Rights\) 1994](#) (TRIPS)

⁴⁸ [The Copyright \(Computer Programs\) Regulations 1992](#) insert sections 50A to 50C CDPA, enacting the [Software Directive](#)

⁴⁹ [Flos SpA v Semeraro Casa e Famiglia SpA Case C-168/09 Judgment of the Court \(Second Chamber\) of 27 January 2011](#)

⁵⁰ [Joined Cases Football Association Premier League Ltd and Others v QC Leisure and Others \(C-403/08\) and Karen Murphy v Media Protection Services Ltd \(C-429/08\) JUDGMENT OF THE COURT \(Grand Chamber\) 4 October 2011](#)

⁵¹ Note s.73 CDPA is in the process of being [repealed by the government](#), a move that is welcomed by BCC.

⁵² Chapter 3, [Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission \[1993\] OJ L 248/15](#) (the Satellite and Cable Directive)

The existing exceptions have been found to comply with the international Berne three-step test.

The approach towards orphan works is based on the European Orphan Works Directive⁵³; the UK government could decide to vary the relevant section 76A in the CDPA if they choose to do so; this is highly unlikely given that UK government considered a licensing based approach to orphan works even before the Orphan Works Directive was adopted.

As previously emphasised, whilst such changes would be legally possible following the withdrawal from the European Union, it is unlikely that changes to copyright feature on the top of the agenda of government.

V. Dealings with Rights in Copyright Work

Sections 93A to 93C CDPA are based on the EU Directive concerning rental and lending rights⁵⁴ and could be amended following the withdrawal from the European Union.

VI. Remedies

Section 97A CDPA is the implementation of Article 8(3) Information Society Directive⁵⁵ and could be varied after withdrawal from the European Union, however, as was argued by the UK government during the implementation of the Information Society Directive, website blocking orders were already available under existing UK civil law⁵⁶. Note also the Court of Appeal's decision in the Cartier/ Richemont case⁵⁷.

VII. Collective Rights Management

Sections 116 CDPA onwards have been amended through the Collective Management of Copyright (EU Directive) Regulations 2016⁵⁸. These regulations are stand-alone and could be varied by the UK government however they underpin an important voluntary system in which the UK CMOs set the standard. It remains to be seen how the withdrawal from the European Union impacts

⁵³ [Council Directive 2012/28/EU on certain permitted uses of orphan works L 299/5](#) (the European Orphan Works Directive)

⁵⁴ [the Rental Directive](#)

⁵⁵ Article 8(3) the [Information Society Directive](#)

⁵⁶ as the High Court has jurisdiction under section 37 (1) of the Senior Courts Act 1981 to 'order an injunction...in all cases in which it appears just and convenient to do so'

⁵⁷ [Cartier International AG and others v British Sky Broadcasting Limited and others \[2016\] EWCA Civ 658](#)

⁵⁸ [The Collective Management of Copyright \(EU Directive\) Regulations 2016 \(S.I.2016 No.221\)](#)

specifically the implementation of Title Three of the Collective Rights Management Directive⁵⁹ on multi-territorial licensing in view of the on-going voluntary activities of CMOs enabling cross border licensing⁶⁰

VIII. Reciprocity Gap

There are a number of areas of media law and regulation where a simple Great Repeal Bill would have the unintended consequence of creating a reciprocity gap, to the likely disadvantage of UK media businesses. The reason is as follows:

- A number of EU directives and regulations create systems of mutuality or reciprocity whereby, for example, a clearance obtained in one EU member state is valid for the whole of the EU.
- Post-Brexit, a clearance obtained in, say, France would have to be recognised as valid in the UK, because the Great Repeal Bill would have the effect that the UK will continue to follow the rule applicable to the rest of the EU.
- But the opposite would no longer be true; a UK clearance would on the face of it no longer be good in France, because the EU rule only requires France to accept clearances obtained in other EU member states.
- So, if passed in the form suggested, in the absence of trade agreements, the Great Repeal Bill would likely penalise UK-based media businesses and operate as a direct disincentive for them to establish themselves (or remain) in the UK.

More detail on this and the potential (albeit cumbersome) solution can be found in Phil Sherrell's article on this subject⁶¹

⁵⁹ Part 3, [The Collective Management of Copyright \(EU Directive\) Regulations 2016 \(S.I.2016 No.221\)](#)

⁶⁰ C.f. the international rights management services provided by the International Copyright Enterprise ([ICE](#)).

⁶¹ [Brexit and the Reciprocity Gap, Phil Sherrell, Bird & Bird LLP](#)

IX. Performers' Rights

Performers' specific provisions in sections 182-184 CDPA and 191 onwards are based on the WIPO Performances and Phonograms Treaty 1996⁶² (subsequently adopted as a Community Treaty).

X. Technological Protection Measures

The UK will have some flexibility to vary Sections 296ZA onwards (currently based on the Information Society Directive⁶³). Again, WIPO Internet Treaties⁶⁴ require Technological Protection Measures but the detail can be changed beyond minimum harmonisation.

XI. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled

The impact of the implementation in the European Union of the proposed Directive⁶⁵ and Regulation⁶⁶ on certain permitted uses of works for the benefit of persons who are blind, visually impaired, or otherwise print disabled will be limited.

The exception of printing accessible copies for disabled persons under Sections 31A – 31F CDPA already complies with the Marrakesh Treaty⁶⁷ notwithstanding the existence of a European Union Directive. No changes are required and are probably also not possible once the UK ratifies the Marrakesh Treaty (independent of whether the UK ratifies as part of the European Union or as an independent state outside the EU; once the withdrawal has happened the UK has

⁶² [WIPO Performances and Phonograms Treaty 1996](#) enacted in the UK through [The Performances \(Moral Rights, etc.\) Regulations 2006 \(S.I. 2006/18\)](#)

⁶³ Article 6 the [Information Society Directive](#)

⁶⁴ [The WIPO Copyright Treaty 1996](#) and the [WIPO Performances and Phonogram Treaty 1996](#) are together known as the "Internet Treaties"

⁶⁵ [Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. \(The Proposal for the Marrakesh Directive\) COM\(2016\) 596 final, 14.9.2016.](#)

⁶⁶ [Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind. \(The Proposal for the Marrakesh Regulation\) COM\(2016\) 595 final, 14.9.2016.](#)

⁶⁷ [Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, 2013.](#)

to ratify by themselves because it is not covered by the EU ratification. Note, the UK has signed the other Treaties⁶⁸ other than the WIPO Audio-Visual Performances Treaty as themselves – dual membership). If outside the European Union, the UK does not have to comply with choices made by the European Union when implementing the Marrakesh Treaty, for example regarding the fact that “Member States should not be allowed to impose additional requirements for the application of the exception” (proposed Recital 11⁶⁹).

However, the part of the Directive regarding the exchange of accessible format copies⁷⁰ refers to European Union Member States and will not be applicable to the UK once the withdrawal has occurred (unless this is specifically agreed; this is not required given that the UK has to provide a system of cross border exchange of accessible format copies under the Marrakesh Treaty once ratified).

As far as the Regulation is concerned, the UK will qualify as a third country when they ratify the Marrakesh Treaty⁷¹ and therefore European Member States will have to apply the standards of the Regulation when arranging the cross border exchange of accessible format copies with the UK. This will not impose any conditions on the UK itself (subject to an express agreement to the contrary regarding the application of the Regulation with the European Union). The exchange mechanism will nevertheless be based on the Marrakesh Treaty directly.

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⁶⁸ For example [The WIPO Copyright Treaty 1996](#) and [WIPO Performances and Phonogram Treaty 1996](#)

⁶⁹ Recital 11, [the Proposal for the Marrakesh Directive](#)

⁷⁰ Recital 10, [the Proposal for the Marrakesh Directive](#)

⁷¹ Article 1, [the Proposal for the Marrakesh Regulation](#)