

Editorial

Brexit and UK copyright: the story of a loss among all other losses

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On 23 June 2016 UK voters decided that their country would be better off outside the EU. To say the least, the historical outcome of the Brexit referendum will have a tremendously serious impact on the UK, the overall EU integration project and the remaining Member States alike.

From an IP perspective, it is still very unclear what will happen, and what effects forthcoming developments will have on both UK law and the professional (and necessarily personal) lives of IP owners, practitioners, academics, students, civil servants, judges and public affairs executives.

Serious uncertainty surrounds the destiny of EU-wide registered rights, including trade marks and designs, and imminent EU-wide novelties, such as the Unitary Patent System, in the UK. In the aftermath of the referendum outcome, the complexities of these rights have seemingly overshadowed what will happen to copyright, an IP right that—it has now become apparent—is territorial only on paper.

Over the past few years, the copyright laws of EU Member States have increasingly become more similar, less alien to each other, less perched in the summa divisio common law's copyright/French-style *droit d'auteur*. On the one hand, EU legislature has adopted several directives that have had the *laudable* objective of facilitating the free movement of goods and services based on or incorporating copyright works. On the other hand, the Court of Justice of the European Union (CJEU)—prompted by questions of national judges—has become a primary player in the EU copyright scene, acting in certain cases as *de facto* policy- and law-maker.

If and when Brexit happens, what will be the legacy of EU harmonization in the area of copyright? The answer will depend on what route is eventually pursued.

If the UK leaves the EU but remains in the European Economic Area (probably the most optimistic outlook at the moment), then the relevant body of EU copyright legislation will continue to apply in this

country. However, the same could not be true for CJEU case law, at least from a formal standpoint. Although the judgments rendered in the context of references for a preliminary ruling ex Article 267 of the Treaty on the Functioning of the European Union (ie the types of actions relevant in the area of copyright) would likely maintain a certain relevance for UK copyright, UK courts could lose their power to make themselves references to the CJEU. In fact Article 267(2) reserves this possibility to the courts or tribunals of *Member States*. The result would be odd: the UK would still apply EU legislation but its judges would no longer be able to query their correct interpretation (and application).

In any other scenario, the future relevance of EU copyright legislation and CJEU case law in the UK is extremely uncertain. Possibly bound by international copyright instruments only, the UK might decide to pursue routes that—so far—have appeared extremely unlikely to be followed at the EU level. For instance, it could decide to abandon a closed system of copyright exceptions and adopt an open norm instead, possibly modelled on US fair use.

In times of profound confusion, what appears clear—not just to an EU enthusiast like myself—is that EU action in the area of copyright has BENEFITTED and IMPROVED UK law.

First, it has created a harmonized space for EU Member States that, albeit imperfect, is much better—for rightholders and users alike—than what, in a much more fragmented fashion, was the case 20–25 years ago.

In addition, the harmonizing (possibly even undue in certain instances) efforts of the CJEU have brought increased uniformity and, in some cases, have compelled Member States to either rethink particular approaches or meet the challenges facing technological advancement and digitization of contents and their distribution channels. An example of the former is the impact of CJEU case law on the UK notion of originality and the

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(outdated, yet still formally in place) closed subject-matter categorization envisaged by the Copyright, Designs and Patents Act (CDPA). An example of the latter is the availability of injunctions against intermediaries under s97A CDPA (introduced to implement into UK law an EU directive): the jurisprudence of UK courts, influenced by parallel developments at the CJEU level, has developed solidly and thoughtfully and has been looked at (whether with admiration or concern, but in

any case regarded as IMPORTANT case law) in other Member States.

Will UK copyright be better off without EU copyright and the CJEU? No: the improvements to UK copyright over the past few years are in many instances greatly indebted to parallel developments at the EU level. Among other things, losing the dialogue between thoughtful UK judges and the CJEU will be one of the many great losses for UK copyright.