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Introduction

The European Union (Withdrawal) Act 2018 (the "**Withdrawal Act**") took its place in the UK statute book on 26 June 2018 following months of debate, rebellion and compromise in Parliament and Government. This legislation will repeal the European Communities Act 1972 (the "**ECA**") (the statute through which European Union law takes effect in the UK) and sets out how European Union law will apply in the UK after "exit day".[1]

Copyright law is not fully harmonised at EU level, therefore it might be expected that the disruption to UK copyright law following exit day will be minimal. However, that would be to oversimplify the issue. There are a large number of EU instruments which apply to industries which are underpinned by copyright, for example, those businesses operating in the media sector. These instruments, which are discussed in more detail below, are intended to bring into effect the EU's ultimate goal of creating a single market for goods and services which is free from regulatory barriers. The level of cooperation between Member States required in order to achieve a single market goes far beyond the setting of minimum standards or harmonisation of certain laws and hence in many cases has required adjustments to specific parts of EU copyright law. The devil is therefore in the detail, rather than in the possible changes to underlying copyright law principles.

A good example of this relates to exhaustion of rights. At present, the import into the UK of a copyright work legally in circulation anywhere in the European Economic Area (the "**EEA**") is not an infringement of the copyright in those works, because the UK is deemed to be part of the same market and the rights are "exhausted".[2] If, following exit day, the UK does not become part of the EEA then, without an amendment to the Copyright Designs and Patents Act 1988 (the "**CDPA**"), sales in the UK would not be treated by EEA states as relevant for exhaustion purposes, but sales in the EEA would exhaust rights for the UK. Such an imbalance could put UK exporters at a significant disadvantage compared to their European counterparts.

This is an example of a so-called "reciprocity gap", a phenomenon which may arise in many different industries and hence is one of the key issues with which the Government will need to grapple after exit day.

This chapter will look at how the Withdrawal Act might affect UK copyright law as well as businesses in sectors which rely on copyright law, both immediately following exit day and in the more distant future. We will also consider what steps the UK Government may be able to take under the Withdrawal Act to address the potential adverse impacts; the proposal to do so via so-called "Henry VIII" powers is controversial.

A caveat

Any analysis of the impact of Brexit comes with the caveat that, at the time of writing, there is still huge uncertainty over the nature of the future relationship between the UK and the EU. This difficulty is exacerbated as the two most likely options are so radically different. On the one hand is a "hard" or "no deal" Brexit where no agreement is reached as to the terms of the UK's withdrawal from or future relationship with the EU, and all current ties are severed, at least initially. This is also referred to as the "cliff edge", where membership of the EU, and all that entails, ceases overnight on exit day. On the other hand is a "soft" Brexit under which the UK retains a relationship with the EU (at least temporarily, and perhaps in the medium to longer term) which largely preserves existing arrangements, including access to the European single market. There is an intention on the part of both the UK and the EU to have a transition period from "exit day" to 31 December 2020, but this is conditional on both sides agreeing a withdrawal treaty.

In July 2018, the UK Government presented a white paper titled "The Future Relationship between the United Kingdom and the European Union" (the "**White Paper**")[3] which, at the time of writing, reflects the UK's most up-to-date proposal. It remains to be seen to what extent the White Paper is acceptable to the remaining Member States (or indeed to the UK Parliament), however for the time being, this is the clearest expression of the Government's intentions.

The Withdrawal Act

During its passage through Parliament, the Withdrawal Act was known as the "Great Repeal Bill"; however, only the ECA will actually be repealed. The real purpose of the Withdrawal Act is to transpose EU law, as it stands at exit day, into UK law. The mechanism by which this will be achieved depends on the nature of the EU legislation in question.

The first category of legislation is so-called "EU-derived domestic legislation". This is national legislation which has its origins in the EU. Under s2 of the Withdrawal Act, such legislation will remain as it is prior to exit day. This would include EU directives which have been implemented by the UK, such as the InfoSoc Directive[4] (implemented through the Copyright and Related Rights Regulations 2003) and the E-Commerce Directive[5] (implemented through the Electronic Commerce (EC Directive) Regulations 2002).

The second category of legislation is so-called "direct EU legislation", which includes EU regulations (which are directly effective in UK law). Under s3 of the Withdrawal Act, all such

legislation which is operative immediately before exit day will be deemed to form part of domestic law on and after exit day.

There is a further category of EU law which is those rights, powers, liabilities, obligations, restrictions, remedies and procedures which have been recognised and are available in domestic law prior to exit day, and are enforced, allowed and followed accordingly. Such provisions will also continue to be available in domestic law after exit day under s4 of the Withdrawal Act.

Under s6 of the Withdrawal Act, CJEU decisions issued prior to exit day on retained EU law remain binding on all courts below the Supreme Court/High Court of Justiciary (in Scotland). In deciding whether to depart from such retained EU case law, the Supreme Court/High Court of Justiciary must apply the same test as it would apply in deciding whether to depart from its own case law. Future CJEU decisions (i.e. those issued after exit day) will not be binding on UK courts. Even in relation to retained EU case law (i.e. those issued prior to exit day), the nature of the Court's reasoning (often brief and high-level) may allow some latitude for divergence by UK judges in the future, particularly given that parties will lose the right to refer questions of EU law to the CJEU after exit day.

Importantly, the Withdrawal Act only seeks to preserve EU law as it applies in the UK. It does not address the rights which persons in other Member States have in the UK as a result of the UK having been a member of the EU for almost 50 years. For example, the right under the Content Portability Regulation for an EU resident to receive subscription content when temporarily present in the UK, discussed further below. The intention of the Government seems to be to deal with these on a case by case basis. Presumably such rights will only be preserved to the extent they are reciprocated for UK persons operating in the EU. Given the vast number of situations in which issues of this kind will arise, the administrative and legislative resource required to negotiate these arrangements and then give legal effect to them would be very significant.

Henry VIII Powers

One of the most controversial aspects of the Withdrawal Act is the power granted to the Government to amend laws using secondary legislation without the need to consult Parliament. These powers are known as "Henry VIII powers" after the former monarch's supposed preference for legislating directly by proclamation rather than through Parliament.[6]

Such clauses are common to allow minor, uncontroversial changes to the law to be made without consuming unnecessary Parliamentary time in passing a further bill. However, when such powers are granted too broadly there is risk that Parliament is bypassed on issues which the public would expect it to consider as part of the legislative process (ironically, the most wide ranging example of these powers is found in the ECA itself, s2(2) of which gives ministers the power to implement EU obligations through secondary legislation (e.g. to implement EU directives)).

The Henry VIII powers in the Withdrawal Act which allow the amendment of retained EU law without a vote in Parliament are set out under the heading "*Dealing with deficiencies arising from withdrawal*" as follows:[7]

> "*A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate —*
>
> *(a) any failure of retained EU law to operate effectively, or*
>
> *(b) any other deficiency in retained EU law,*
>
> *arising from the withdrawal of the United Kingdom from the EU.*"

The powers are subject to a sunset provision and fall away two years after exit day. Given that it has been estimated that 800–1000 statutory instruments are expected to be required, these two years are set to see a rush of "correcting" legislation.

The Reciprocity Gap

Those aspects of EU law which depend on mutual or reciprocal recognition of rights between EU Member States will not be suitable for simple conversion or continuance under the main provisions of the Withdrawal Act. One of the key uses of the Henry VIII powers is therefore likely to be to enact statutory instruments to address "deficiencies" such as reciprocity gaps of the kind referred to above. In economic sectors which are underpinned by copyright protection, such as the media industry, there are a number of reciprocity issues which will need to be considered. In the following section we highlight some of the major areas which may be affected.

Broadcasting

Under the Satellite and Cable Directive,[8] which was implemented into UK law by amendments to the CDPA, satellite broadcasters benefit from a single point of clearance. When the place from which signals are transmitted to the satellite ("the uplink station") is in the EEA,[9] the broadcast shall be treated as being made from that place. As a result, the act of communication of the protected copyright works occurs solely in that place, thus obviating the need for separate licensing arrangements across all jurisdictions within the EEA.

If the UK leaves the EEA post-Brexit then it will no longer benefit from the mechanism provided for by the Directive (and transposed into the CDPA) because, absent any agreement between the UK and the remaining EU Member States, the latter will regard the uplink as having taken place outside the EEA. This means UK broadcasters would have to clear rights in all Member States reached by the broadcast signal or alternatively move the place of uplink to a remaining Member State.

Unless s6A CDPA is amended post-Brexit (presumably through the Henry VIII powers), the reverse would not be true and EU broadcasters would not need separate rights clearance for the UK. If this is corrected, however, a UK broadcaster that has moved its place of uplink to the EU would still need to clear rights in the UK.

Aside from copyright clearance, a reciprocity gap will also arise in broadcast regulation. Under the AVMS Directive,[10] television broadcasters licensed in the Member State in which they are established cannot generally be subject to more stringent regulation elsewhere. In short, this means that at present (pre-Brexit) a UK-licensed broadcaster can freely broadcast to other Member States and *vice versa*, creating a highly integrated market. For this and other reasons, a large number of international broadcasters currently choose to have their European operations based in the UK.[11] A report commissioned by the Commercial Broadcasters' Association estimates that international broadcasters contribute more than £1bn a year to the UK economy.[12]

After Brexit, UK-based broadcasters will no longer benefit from this arrangement, prompting suggestions that some may relocate in order to remain within the EU. This possibility is recognised as a major concern by the UK Parliament; a report by the House of Commons European Scrutiny Committee in March 2017[13] described the broadcasting sector as "highly exposed" in light of Brexit.

The White Paper states that the UK will not be a part of the EU's Digital Single Market but instead wants to have a "digital

relationship" to cover broadcasting (amongst other things) and is seeking the "best possible arrangements for this sector".

Broadcasting is not typically a concern of bilateral trade agreements, indeed it was specifically excluded from the recent trade agreement between the EU and Canada. However, much about Brexit is unprecedented and it remains possible that an agreement to replace the current broadcasting arrangement can be reached without substantial disruption to businesses.

In the absence of an agreement, the fall-back position will be the 1989 European Convention on Transfrontier Television (the "**CTT**"), which is not part of EU law, and to which the UK is a signatory. This treaty predates the public availability of the World Wide Web and does not cover online streaming, a fundamental component of the services offered by broadcasters today. It also has no equivalent to the single point of regulation rule, referred to above.

Article 17 of the AVMS Directive requires Member States to reserve at least 10% of their transmission time or 10% of their programming budget for European Works created by producers who are independent of broadcasters. However, one benefit of the CTT is that, as the UK is a signatory, works created in the UK qualify as European Works under the AVMS Directive. This means that such works will continue to qualify for the purpose of meeting the budgetary quotas set out under the AVMS Directive. This means that, in contrast to broadcasters, the impact on independent UK television producers should be minimal.

The AVMS Directive is soon to be revised and the recast Directive "**AVMS 2**" will apply not only to broadcasters but also to video-on-demand and video-sharing platforms such as Netflix or YouTube. Under the current AVMS 2 proposal, providers of on-demand audiovisual media services would be required to ensure that at least 30% of their catalogues are European Works. This could provide a further boost for UK-based independent producers.

Music

The regime in article 30 of the Collective Rights Management Directive[14] allows an EU collecting society in one Member State to mandate another to represent its repertoire in relation to online multi-territory music licensing in certain circumstances. That is, to collect and distribute royalties payable for the communication or reproduction of music online.

The Directive has been implemented into UK law; therefore after Brexit, and until the reciprocity gap is addressed, UK collecting societies could be required to continue to represent the repertoires of EU societies without having the right to mandate the same.

Content Portability

The Regulation (EU) on cross-border portability of online content services (the "**Portability Regulation**") came into force on 1 April 2018 and is directly effective in the UK (and therefore subject to the Withdrawal Act). Further implementation through the Portability of Online Content Services Regulations 2018 (the "**Implementing Regulations**") provides a mechanism by which the Portability Regulation can be enforced.

The purpose of the Portability Regulation is to enable content subscribers in the EU to access online content services to which they subscribe (such as Netflix) when temporarily present in another Member State (for example, when on holiday). Pursuant to the Portability Regulation, consumers must be able to access content in the same manner as they are able to in their country of residence.

The effect of the Implementing Regulations is that a breach of certain provisions of the Portability Regulation is actionable by a subscriber against their online content service provider. This means that, unless otherwise addressed, UK service providers will need to continue to allow UK subscribers who are temporarily in the EU to access their UK services post-Brexit. However, with the UK outside the EU, EU-based service providers would no longer have to provide the equivalent right for their subscribers when they are temporarily in the UK.

Article 4 of the Portability Regulation introduces a "legal fiction" such that the provision of services to a subscriber temporarily in a Member State is deemed to take place solely in the subscriber's Member State of residence. For example, a broadcast to a subscriber resident in France is deemed to take place in France regardless of the Member State in which that subscriber may temporarily be present. This means that providers are spared the burden of obtaining additional rights clearances in order to comply with the Portability Regulation.

Post-Brexit, this could present a further issue for UK-based subscribers and providers because the Regulations will no longer cover the latter in the remaining EU Member States. UK providers will therefore not benefit from the legal fiction and will need to secure rights clearances across all Member States in order to comply with their obligations to UK subscribers pursuant to the Implementing Regulation, without risking claims for infringement within each of those Member States.

This would be a significant burden for content providers and therefore the UK Government may seek to address this issue as part of the Brexit negotiations (although this is not currently mentioned in the White Paper). The alternative option to protect UK providers would be to amend the Implementing Regulations and the Portability Regulation (once transposed into UK law by the Withdrawal Act) to remove the obligation to provide content portability. This would be consistent with the statement in the White Paper that the UK will leave the Digital Single Market; however, to do so in this regard would deprive consumers of a right from which they currently benefit, which could be politically unattractive.

Each of these reciprocity issues arises out of the nature of the European Single Market. Over the past 25 years, the Single Market has expanded beyond the scope of any other multinational trade agreement and this expansion is continuing, particularly in the field of services, as can be seen in the ongoing Digital Single Market initiative. The notion of mutual recognition of clearances of rights, for example, simply does not arise in an "ordinary" trade agreement. Such agreements may seek to achieve mutual recognition of standards of goods, for example, but are not based upon the same underlying conceptual foundations as the EU from which such a far-reaching system of reciprocity could be justified (i.e., the desire to achieve a fully integrated single market).

The future relationship between the EU and the UK starts from a history of extremely close cooperation, and therefore it may be that the current arrangements described above could be replicated with the UK outside the Single Market (to the extent that is thought to be desirable). It must at least be hoped that these issues do not fall between the cracks amongst the myriad other issues to be negotiated.

The Digital Single Market and the Copyright Directive

As discussed above, the White Paper states that the UK will leave the Digital Single Market following Brexit and that the Government will seek to replace this with a digital relationship covering, amongst other things, digital technology and broadcasting. However, further

detail on this relationship is lacking at the time of writing, as is the Commission's response to the high-level UK proposal.

One issue which remains to be resolved at a European level is the new Copyright Directive. The negotiations of the draft Directive (or at least parts of it) have proved extremely controversial to date. The controversy (and the delay) is largely a result of the proposed Articles 11 and 13. Article 11 would introduce a press publishers' right which seeks to put press publishers in a stronger position when dealing with news aggregation services. Article 13 is the "value gap" proposal, which seeks to place more responsibilities on online content sharing services to remove or pay for unlicensed works found on their services. Whilst one area of disagreement is between the creative industries and parts of the tech sector, there are also broader concerns around the impact of Article 13 on internet users. Critics of the proposal point to the danger of limiting freedom of expression (by filtering legal content), an increased use of surveillance, and an introduction of a "guilty until proven innocent" regime under which lawful content generators may have to fight against platforms to have their content reinstated.

In July 2018, the European Parliament voted against moving to the next stage of negotiations on the draft Directive. This means that further negotiation of the Directive will not take place until later in 2018, increasing the likelihood that the Directive may not be passed until after Brexit. If passed post-Brexit, the Directive will not be subject to the Withdrawal Act and therefore UK-based business will, at least in theory, not be bound by it. However, as online services are increasingly cross border in nature, it could be the case that UK platforms are *de facto* required to comply with the Directive (should it ultimately be passed) in respect of their European operations in any event.

The more likely scenario, however, is that the Directive is passed either before exit day or during the transition period, but with a deadline to implement it which falls after exit day. In these circumstances, the UK would in effect have an option as to whether to make the Directive part of UK law or not; if implemented domestically it would remain so after Brexit, and if not, it would never take effect in the UK.

Divergence between UK and EU Copyright Law?

Predicting the ways in which the UK may be able to (at a practical level), and may wish to, diverge from EU copyright law in the future is not straightforward. Although the UK will have the option to amend copyright legislation after exit day to depart from EU-derived law, the UK remains a signatory to TRIPS,[15] the Berne and Rome Conventions,[16,17] and the WIPO Copyright and Performances and Phonogram Treaty. This means that, regardless of the apparent freedom to amend domestic legislation derived from EU principles or instruments, the UK will still not have complete freedom to amend its copyright legislation.

Post-Brexit, the UK courts would in theory be free to depart from CJEU case law relevant to, for example, the threshold for originality for copyright protection (which has traditionally been thought to be lower under UK law) or the scope of the communication to the public right, particularly in the digital environment, which we discussed at length in the 2018 edition of this Guide. However, for such a departure to be made through the courts (assuming the judiciary were so inclined), there would need to be a referral to the Supreme Court of a case in which the pertinent legal issue arose. Waiting for the law to be changed in this way can therefore be a time-consuming process.

Another area where divergence could be seen is in relation to exceptions to copyright infringement. For example, the UK government could seek to introduce an exception for private copying without compensation.

Article 5(2)(b) of the InfoSoc Directive permits Member States to introduce a private copying exemption of variable scope provided that rightsholders receive fair compensation. Recital 35 of the InfoSoc Directive further explains that when determining the possible level of compensation, in situations where the prejudice to the rightsholder would be minimal, no obligation for payment may arise. This exception is not mandatory and was not introduced into UK law when the InfoSoc was initially implemented in 2003.

However, following later consultation the UK introduced the Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, which introduced an exception for private copying without compensation. The Regulations were passed on the basis that the exception generated minimal or zero harm to rightsholders such that a compensation scheme was not required.

Following a judicial review, the court held that due to a defect in the process by which evidence was collected and evaluated during the consultation process leading up to the adoption of the 2014 Regulations, the decision to adopt the new private copying exception without fair compensation was unlawful. The issue upon which the review turned was that the evidence relied upon to justify the conclusion about harm to rightsholders (or the lack thereof) was inadequate to support such a conclusion.

If the Government sought to introduce the same exception post-Brexit, the UK would not need to base the exception on the InfoSoc Directive nor therefore follow the constraints therein in formulating the exception, i.e. by having an accompanying compensation scheme.

Conclusion

In this chapter we have sought to highlight some of the legal and regulatory issues which could arise in the sectors underpinned by copyright law post-Brexit.

Whilst some of the scenarios involving a lack of reciprocity may be easily overcome by secondary legislation under the Henry VIII powers, the resultant loss of access to the Single Market is likely to remain a major concern, particularly for broadcasters.

The challenge now faced by the UK Government is to seek to find a way to protect these sectors as the UK transitions to a new relationship with the EU. The broadcasting sector is clearly on the Government's radar, although how the current access to the EU from which UK-based broadcasters benefit could be preserved with the UK out of the Single Market remains to be seen. Other issues, such as collective licensing, are not mentioned by the White Paper and therefore industry lobbyists will need to ensure that these do not get overlooked amongst the many other less prominent details which will have to be addressed.

Brexit comes at a time when EU copyright law is about to undergo the most significant reform since the InfoSoc Directive was passed in 2001. Regardless of precisely what final form the new Copyright Directive takes, the general direction of travel at the EU legislative level is towards a more regulated digital environment. This leaves the UK with a choice of whether to follow the direction taken by the EU or to seek to gain a competitive advantage by moving towards a less regulated US-style environment. Any in-between position risks leaving the UK with a regulatory environment that is neither one thing nor the other. Such a situation would be unattractive and complex for both US and EU rightsholders and other copyright stakeholders.

Given the UK Government's apparent desire to retain a "digital relationship" with the EU, it may be more likely that future

legislation closely follows the direction of travel taken by the EU in order to preserve the benefits of Single Market access currently enjoyed by both businesses and consumers.

Endnotes

1. At the time of writing, "exit day" is 29 March 2019 (at 11pm GMT), however the Withdrawal Act contains express provision for this to be amended.
2. S18 Copyright, Designs and Patents Act 1988.
3. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf.
4. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
5. Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).
6. https://www.parliament.uk/site-information/glossary/henry-viii-clauses/.
7. S8(1) European Union (Withdrawal) Act 2018.
8. 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.
9. S6A CDPA refers to the EEA rather than the EU (i.e. the EU plus Norway, Iceland and Liechtenstein). It is possible that the UK could remain in the EEA post-Brexit; however, at the time of writing, this seems to be an unlikely outcome of the withdrawal negotiations.
10. Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).
11. See Commercial Broadcasters Association's Brexit briefing paper Nov 2017. "*The UK is Europe's leading international hub for global media groups, home to more television channels than any other EU country. Around 1,400 channels are based here, representing more than a third of all EU broadcasters. More than half (758) of the channels licensed in the UK actually broadcast to overseas countries, not to the UK.*"
12. http://www.coba.org.uk/coba_latest/coba-calls-for-clarity-on-brexit-transition-deal/.
13. https://publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxxi/71-xxxi.pdf.
14. Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.
15. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).
16. The Berne Convention for the Protection of Literary and Artistic Works (1886).
17. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961).

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