Cooley

Brexit – Implications for Copyright

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On 23 June 2016 the UK voted by a narrow margin to leave the EU. The decision itself has no direct impact on copyright legislation or practice, but, as UK copyright law is partially derived from, and intended to be consistent with, EU law, the UK in due course may have to introduce new legislation to fill some of the gaps that Brexit would create. The precise extent of the impact of Brexit is unlikely to be known for some time.

Important points to be aware of

- The UK has not yet begun the process of leaving the EU. The referendum is only the first step in what is likely to be a long process. Until Brexit occurs, the UK will remain a Member State of the EU and will continue to apply EU law, as interpreted by the Court of Justice of the European Union. Much of the UK's copyright law is governed by domestic rather than EU legislation: Brexit will not automatically change domestic law, which will continue to apply after Brexit.
- Given the large number of issues that will have to be addressed to facilitate an orderly departure from the EU, it is unlikely that there will be any significant changes to the copyright regime for at least a few years. Nonetheless some legislation, particularly concerning the transit of goods and the recognition and enforcement of judgments, is likely to be required to smooth the transition.
- Now is a good time to review your IP portfolio, your licenses and your supply contracts, to determine what action you may need to take in due course. However, until decisions regarding withdrawal have been taken, we advise monitoring the situation rather than making any irreversible decisions based on assumptions of likely outcomes.

How will copyright be affected by Brexit?

The domestic UK copyright regime comprises legislation which: (i) implements a set of EU Directives harmonising many elements of copyright across the EU; and (ii) contains laws on copyright that are unique to the UK, for example in relation to certain aspects of authorship and ownership, assignment and licensing of rights and defences/exceptions. Some of these differences are constrained by Treaty obligations that apply to the UK whether or not it is a member of the EU. Only a small part of the UK's substantive copyright regime is dependent upon membership of the EU or the EEA.

Although the UK may have the ability, legally, to amend its copyright regime post-Brexit, there are strong commercial reasons to maintain the status quo. Furthermore, given the political capital required to negotiate Brexit, and the complexity of applying copyright to the digital economy, it is highly unlikely that the government will embark upon a program of significant amendment to the domestic copyright regime in the short/medium term.

Possible implications

Whilst substantive change to the domestic copyright regime is therefore unlikely in the near term, we explore below some of the possible implications of Brexit on copyright holders with regard to:

1. exhaustion of rights;
2. the interpretation of the law; and
3. enforcement of copyright.

Exhaustion of rights

Under UK law as it stands today, copyright owners have the exclusive right to make the first distribution of copies

of their works within the EEA. Once they have done so, their right to restrict the further distribution of those copies within the EEA is severely restricted: it is said to have been "exhausted" by their act of merely putting the copy on the market in the EEA. Corresponding provisions exist in the other Member States. This creates a secondary market for "parallel imports"- genuine products imported from another country without the permission of the right holder – within the EEA.

The potential for Brexit to disrupt the secondary markets in the UK and the EEA, at least under current law, is significant. The UK may still remain a member of the EEA even after Brexit. If the UK does not remain a member of the EEA it will, in all likelihood, remain lawful for a UK business to import products from the EEA; but it will not be lawful for an EEA business to import products from the UK. Bizarrely, goods put on the market in the UK may not be resold even within the UK, since the right to resell goods only applies to goods first sold "in the EEA", which therefore excludes a UK which is outside the EEA. Some amendment of domestic legislation would be needed to avoid this unfortunate state of affairs. The terms on which UK goods might be imported into the EEA and resold there will be a matter for negotiation and agreement between the UK and the remaining EEA member states (whose member states will then have to amend their own domestic law).

Interpretation of the law

Changes to the UK's copyright regime may emerge as UK courts begin to develop their own body of jurisprudence without reference to the CJEU.

Any change is most likely to occur on issues where the common law does not sit comfortably with case-law from the CJEU, or where the dynamism of the UK's court system allows the judiciary to react more quickly to a changing world, for example in relation to business models involving digital resale. Litigation to test the boundaries of any such willingness of the courts, is highly likely.

Nonetheless, as noted above there are strong commercial reasons to maintain a coordinated approach to the interpretation of copyright law, given its importance to the supra-national digital economy and that it has many of its roots in treaties to which the UK will remain bound regardless of its relationship with the EU. It may therefore be that even if the UK is not a member of the EU, UK courts will make a concerted effort to adopt the interpretation of copyright law handed down by the CJEU in the interests of promoting consistency and certainty. However, even if the UK courts were to decide to follow the reasoning and decisions of the CJEU, there would not necessarily be any reciprocal obligation on other member states to pay deference to decisions of the UK courts.

Further, it is likely that, in the period between the given of notification under Article 50 and leading up to Brexit, and depending on the UK's eventual relationship with the EU, UK courts will be less inclined to make references to the Court of Justice, given the limited precedential value any such references would have and the significant length of time they add to resolving a dispute (about 2 years). There is some ambiguity as to how the CJEU would deal with references still outstanding at the point of Brexit, but in practice this is a question unlikely to affect many litigants.

Enforcement of copyright

Unless UK judgments continue to be recognised by and enforceable throughout in the EU, and vice-versa, post-Brexit litigants will need to consider whether to bring proceedings for infringement in the EU *and* the UK, or in just the EU or in just the UK.

If the EU member states agree to continue to recognise and provide for the enforcement of UK judgments in their jurisdiction, the UK may be able to protect its status as a venue of choice for copyright and other forms of intellectual property litigation. If not, some claimants may elect to pursue proceedings in only one jurisdiction; and there is a significant risk that such claimants will forgo a remedy that applies only in the UK in favour of a remedy that applies across the whole of the EU. Others may see opportunities in potential divergence between the rulings of the UK courts and those of the CJEU, or in forum shopping and the tactical commencement of proceedings in overseas jurisdictions.

What about EU proposals for further harmonisation of copyright?

As part of its Digital Single Market initiative, the EU has embarked on a program of copyright reform including proposals surrounding geo-blocking, cross border licensing and intermediary liability. The UK has been a leader in the digital economy and has been at the centre of ensuring these reforms work for our creative industries and our consumers.

Once Article 50 is triggered, however, the UK will no longer be able to assert the same influence on the development of the digital single market initiative or on any other EU policy as it does now. Post Brexit, the impact of future EU-led copyright reforms on the UK will depend upon the terms of the UK's departure, although it is likely that access to the single market will require the UK to adopt the reforms.

Key takeaways

Don't panic! Nothing has changed (legally) and law reform is a slow process: no changes are imminent. Furthermore the interconnectedness of business today means there are strong commercial reasons for keeping the UK's copyright regime broadly in line with that of the EU and therefore of maintaining the status quo, at least for the time being.

To a large extent, the UK is already in control of the majority of its domestic copyright regime and this will not change. However, the continuation of trade from the UK into the EEA and the ability of UK courts to hand down judgments that bind other member states' courts are matters over which the UK will no longer have control once notice has been given under Article 50. These, and many other issues, will have to be addressed as part of the government's negotiations with the other 27 member states of the EU.

We expect a clearer picture to emerge in the coming months. In the meantime, Cooley will provide further updates as the UK decides how it will ensure that copyright holders are able to navigate the uncertainties and issues raised by Brexit.

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