

How will Brexit affect copyright legislation?



*The UK's future relationship with the European Union, and the implications for UK regulation, are full of uncertainty. For example, how much of the EU's Digital Single Market strategy the UK will maintain is unclear. Here, **Professor Alison Harcourt** of the University of Exeter looks in detail at the DSM initiative's copyright package, and the potential impact of the UK leaving the EU on UK and other European stakeholders.*

Background on the DSM

One-fourth of the European Commission's Communication '**Upgrading the Single Market: more opportunities for people and business**' released in October 2015 dealt with digital single market (DSM) initiatives, drawing on an earlier Communication released in May 2015, **A Digital Single Market Strategy for Europe**. The roadmap for the DSM includes 19 different actions. A number of new EU Regulations and Directives as well as revisions of existing ones are being proposed during 2015–17 in order to implement the strategy. This includes: a new Copyright Package, revision of the **Audiovisual Media Services Directive**, **review of the Satellite and Cable Directive**, review of the **Telecomms package** (under the September 2016 '**Connectivity package**'), **revision of the e-Privacy Directive**, consumer protection legislation, revised VAT regimes, a **geo-blocking Regulation**; an **e-Government action plan**, competition inquiries into online trade in goods and services as well as other measures to handle cross-border on-line trade. This brief discusses the EU's copyright package.

The copyright package

In its September 14 2016 Communication, **Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market**, the European Commission released proposals for a new **Copyright Package**. The package announced proposals for two Directives and two Regulations along with other measures, as well as supporting an existing 2015 proposal for a Regulation on cross-border portability. This **Regulation** proposed in 2015 will permit citizens to access digital content that they have subscribed to in their country of residence across EU borders. So, for example, a person travelling abroad would be able to view packages such as Sky Cinema he or she subscribed to at home, or listen to music on his/her Spotify account abroad.

The proposal for the second **Regulation** released in September 2016 aims to facilitate the access to online content across borders. The main recommendation is to apply the Country of Origin (COO) principle currently enshrined in the Satellite and Cable Directive to online services. The COO currently allows linear content (satellite channels, cable and digital terrestrial packages) to be broadcast from one Member state to another without restrictions. The European Commission has proposed this be extended to non-linear services. This would allow video-on-demand services, on-line games and music streaming based in one EU Member State to be received without restrictions in another Member State clearing the need to negotiate for copyright in each country. The proposal is buffered by the proposed **geo-blocking Regulation** which would prevent EU states from blocking access to websites and other on-line interfaces by geographical location, often by re-routing customers to nationally based webpages.

These proposals are flanked by a proposal for a **Directive** on Copyright in the Digital Single Market which covers the use of digital content across borders with a focus on scientific research and preservation of cultural heritage. The main purpose is to remove cross-border rules on copyright for non-commercial use. The Directive provides a list of 'mandatory exceptions' for non-commercial use of on-line works including press publications, books, scientific publications,

digitalised museum archives, text and data mining. Non-commercial use refers to work carried out by universities, research organisations; schools and digital uses of works for teaching. The exceptions allow users to utilise copyrighted works without the authorisation of rights holders.

The Directive also proposes a mechanism to facilitate negotiations of licensing agreements for European-produced films, television and radio programmes to promote their availability across borders on e.g. video-on-demand platforms. This would be supported with the financing of European creative content and distribution under the 'Creative Europe' MEDIA programme and an extension to on-line services for European content quotas under the Audiovisual Media Services Directive (AVMSD) which also has requirements for visibility of European content in film/programming catalogues. It is also coupled with a Regulation and Directive dealing with the cross-border exchange of works for persons who are blind, visually impaired or print disabled thereby implementing the Marrakesh Treaty.

So what will happen when the UK leaves the EU?

As with AVMSD, SatCab and the General Data Protection Regulation, a key concern raised by UK stakeholders is the definition in the Country of Origin principle. If a company or organisation needs to be established and headquartered within an EU state, then UK firms may not be able to access EU markets post-Brexit. This has consequences for broadcasters and companies such as Virginmedia, the BBC and Sky, that offer online services to Europe via satellite, cable and, increasingly, the internet and mobile phones. It also affects UK-domiciled online games companies operating in Europe.

A second issue is whether UK produced content would count as 'European works' or not. Under the revised AVMSD, there is a mandate for on-demand services to reserve at least 20% of their catalogues for European works and to make these works prominent. This would mean that, for example, Netflix, which is licensed in the Netherlands, would be required to have 20% of its catalogue devoted to European content. If the UK were not an EU member, UK produced content would be excluded in Netflix's quota in favour of EU-produced content.

Lastly, if the UK was not a member of the EU, they would automatically lose EU negotiated exceptions for cultural goods under GATT, audio-visual services under GATS, TTIP and other bilateral treaty agreements. It should be noted that exemptions for communications markets constitute the majority of all MFN exemptions granted under GATS. Exemptions include: screen quotas, subsidies, duties, deposits and taxes for film, the transmission of radio and television and video on-demand packages (linear and non-linear) and the subsidisation of public service broadcasting.

Unlike Directives, Regulations are immediately binding so the UK might be subject to the Regulations prior to Brexit depending upon the time of enactment. The Directives are not expected to be implemented by the time the UK 'brexits,' so the UK needs to take a decision on whether or not it joins Europe on its single market path or furrows its own path. What is clear however is that, if the UK follows the EU's lead, new legislation needs to be commenced very soon as to keep in line with the EU's legislative schedule, as all EU Regulations will cease to be effective upon the Leave date. The UK needs to begin WTO negotiations for goods and services exemptions if it wishes to maintain these under GATT/GATS as these will also cease to apply.

This post gives the views of the author and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics and Political Science.

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