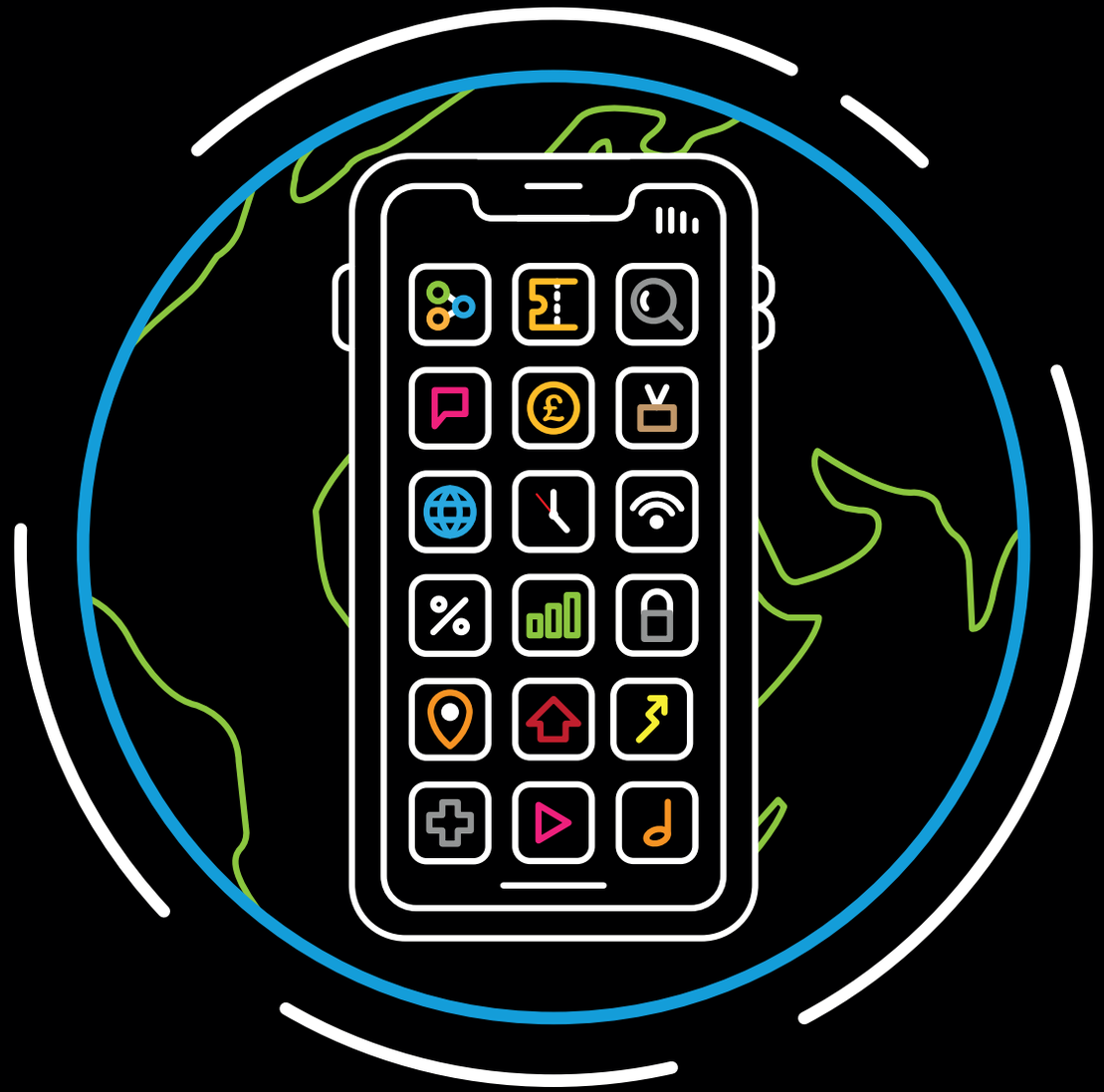
INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS

Nationalism vs globalism: regional and transnational legal issues reshaping the entertainment industry

Edited by William Genereux & Marijn Kingma



IAEL 2020

"Nationalism vs globalism: regional and transnational legal issues reshaping the entertainment industry"

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Message from the President: Jeff Liebenson

I hoped this year of 2020 would be marked by our pursuit of this very interesting and relevant topic of Nationalism vs Globalism. And also my tenth year of serving as President of the IAEL, which is and continues to be such an honor.

But we are confronted by a pandemic that has affected our world. As we go inward to avoid mass contagion and yet continue to hear about its devastating effects across the globe, it sometimes is difficult to think of anything else. I echo the co-editors' hope that normalcy will to some degree return soon.

I am quite certain that the subject chosen by our co-editors will remain relevant. So in that spirit, we move on.

At times like this, it's inspiring to see the IAEL do what the IAEL does best—focusing on the key issues of the day, and enjoying the collegiality of our fellow members across national boundaries.

So while the world is going through distancing and isolation, the IAEL has come together to mount its first-ever digital IAEL Legal Summit. This has been a true group effort with major contributions from different corners of the world, bringing our different backgrounds and perspectives to work together across national borders.

I want to thank Marijn Kingma from The Netherlands and William Genereux from Canada, our co-editors who have brought their experiences from where they live and their legal expertise to life in developing this book, as well as our contributors for providing their rich perspectives.

Thanks to Duncan Calow and Marcel Bunders for your continued support, guidance and humor with respect to the many adversities we have weathered this year!

While the book focuses on digital and other entertainment deals crossing borders, it also addresses what legal needs still should be considered on a national or country-by-country basis. Our hope is that exploring these legal trends will help us in guiding our clients to deal with our multicultural world of entertainment law, notwithstanding the nationalistic urges of our time.

Perhaps this mirrors our staging of this digital IAEL Legal Summit with members from around the world enjoying our different cultures and coordinating our common interests.

We look forward to the upcoming publication of this, our 35th annual book published by the IAEL, Nationalism vs Globalism: Regional and Transnational Legal Issues Reshaping the Entertainment Industry.

Editors' Introduction:
William Genereux & Marijn Kingma

When this year's topic 'nationalism vs globalism' was chosen at the IAEL general meeting in 2019, no one could have foreseen that our world would soon be faced with a global pandemic. As we are writing this, COVID-19 has halted normal life throughout the world. With countries taking extreme lockdown measures, the impact on the economy is unimaginable and the entertainment industry had been brought to a near standstill. Concerts, festivals, movie releases and other events have been cancelled and entertainment lawyers are faced with unprecedented legal issues. But the entertainment industry is also proving its creativity in these times with initiatives like drive-in festivals, balcony concerts and virtual movie watching parties.

It was unavoidable that Midem, where we present our annual IAEL book each year, was cancelled. This has led to the decision to hold our 2020 IAEL book so that we can present it to the IAEL community at next year's Midem. The book will be released as the "IAEL 2020-2021" book. We believe the topic and content of the book will remain relevant.

However, we did not want to refrain from publishing anything at all this year, so we have decided to release five contributions from our book for next year as a 'sneak preview.' We believe the chapters we have chosen are a good reflection of our book and are also great standalone reads.

Our 2020-2021 book will explore the longstanding conflict between nationalism and globalism as it relates to the entertainment industry. Contributions will be subdivided into three major categories. The first category focuses on issues in specific jurisdictions and markets. The second attempts to map-out the expansion of regional forces into wider applications. The third seeks to bring a holistic view that reconciles many of the vital issues affecting the industry at large, and which are shaping our future world.

As a sneak preview from the first chapter, we have chosen a contribution about the effects of Brexit on the entertainment industry, a topic that cannot be missed in a chapter about regionalism. From the second part of our book, we have selected two articles about the effect of the GDPR around the world, as countries are adapting their data protection legislation to keep up with Europe's strict rules. Finally, we have released two contributions from the third chapter of the book. The first looks at the (im)possibility to regulate fake news and political advertising on social media platforms. The second article is about what is no doubt the biggest challenge of our times: global warming. The article discusses environmental impacts of recorded music and what we as lawyers can do to help mitigate climate change.

The fast spread of the virus is a direct result of globalization – international air traffic has quickly moved it around the world. And while countries are all imposing their own countermeasures, the virus knows no national borders. Meanwhile, globalization may also halt the virus. The global scientific community was able to find a reliable test for COVID-19 within days and is now working together to find a treatment and a vaccine. We are hoping that by the time our book comes out in 2021, global efforts will have resulted in a return back to – relative – normalcy.

We would like to thank IAEL's president Jeff Liebenson for his time, effort and leadership. We would also like to thank Janneke Popma, associate at Höcker, for her indispensable organizational skills. Additionally, the authors all need to be recognized for their creativity and their understanding when we had to postpone the release of the book.

Thank you everyone.

>> William Genereux

TORONTO

William is a Toronto lawyer with 35 years' experience in entertainment law, corporate law and litigation. In the 1980s he played in a hardcore punk band. In the 1990s he co-owned and operated a dance music record label. In the 2000s he was a lecturer at the Ted Rogers School of Management – Ryerson University, Toronto. His clients include top-selling recording artists, producers, writers, digital technology entrepreneurs and filmmakers. He is a member of the Law Society of Ontario, volunteers with Artists' Legal Aid Services in conjunction with the University of Toronto Faculty of Law, and is a past-chair of the Canadian Bar Association – Ontario, Entertainment, Media and Communications Law Section.

>> Marijn Kingma

U.S.A.

Marijn Kingma is a partner at Höcker Advocaten, based in Amsterdam. Marijn specializes in information law, with a focus on copyright and privacy-related issues. Marijn has a varied practice; her clients range from collective management organisations and NGO's to broadcasters and international entertainment companies. She conducts complex, strategic litigation and has been involved in several national and European landmark cases. Marijn is ranked in the Chambers guide as a "very strong, young up-and-coming lawyer" who is "unbelievably good and very clever" and is ranked in the Legal500 guide as "next generation lawyer", noting that "her knowledge, flexibility and positive mood makes working with her a fun, but still very effective experience". She is editor for the Dutch law journal AMI, an active member of the International Association of Entertainment Lawyers and a regular speaker at (national and international) conferences.

Brexit and the entertainment industry: after the UK's retreat from regionalism, how will its copyright system handle nationalism and globalisation?

"As the UK retreats from the regionalism of the EU, the FTA will likely have little significant to say about copyright and the UK is unlikely to provide significant guarantees to the EU that its regime will remain at the "gold standard" level set by the EU."

Authors: Adam Rendle

Adam is a partner in Taylor Wessing's London office, specialising in copyright, media and advertising. He provides a wide range of support for his clients, including complex, strategic advisory work, litigation and disputes, content and advertising deals and corporate transactions. Adam has deep, specialist knowledge of highly technical legal areas. He focuses on the media and tech industries, advising major clients across music, publishing, broadcasting, advertising and digital services. Adam is a member of the IAEL Executive Committee.

>> Introduction

The UK has left the EU and is in a transition/implementation period until 1 January 2021. The UK and the EU need to agree a free trade agreement (FTA)[1] before then to avoid a "cliff edge" or "no deal" Brexit. Writing from the UK, the government's focus has been on issues such as immigration, the colour of the UK's passport[2], fishing waters and ending the jurisdiction of the Court of Justice of the European Union. Demonstrating that Brexit is as much, if not more, about emotion as economics, what will happen to the UK fishing industry has a much higher public and political profile than what will happen to the much more economically, and culturally, significant media and entertainment industries. In a relatively minor attempt to address that balance, this contribution will discuss what impact Brexit could have on the copyright regime, as the foundation of those industries. As the UK government has recognised[3], EU copyright legislation "builds on" international copyright treaties so we must consider in what state those buildings will be left and what, if anything, may be built on top, or in place, of them. Before delving into the specifics, we start with some "Brexit Basics" that the three sections of this chapter refer to.

While not specifically talking about copyright (alas, not a topic which often enters the public conscience, article 17 aside), the current UK government has been clear about its desire to take advantage of its soon-to-be restored sovereignty and create a different regulatory regime to that in the EU. In this light, it is worth bearing in mind the words of the UK's lead Brexit negotiator in a speech on 17 February 2020, as he highlights what divergence may look like (and why) in the UK.

> *"I think looking forward, we are going to have a huge advantage over the EU - the ability to set regulations for new sectors, the new ideas, and new conditions - quicker than the EU can, and based on sound science not fear of the future. I have no doubt that we will be able to encourage new investment and new ideas in this way - particularly given our plans to boost spend on scientific research, attract scientists and make Britain the best country in the world to do science."*

The UK government's desire to diverge was echoed in its published approach to the negotiations[5], which went to great lengths to emphasise that the UK wants to retain the ability to diverge (but whether or not it will actually use it, remains to be seen):

> *"Whatever happens, the Government will not negotiate any arrangement in which the UK does not have control of its own laws and political life. That means that we will not agree to any obligations for our laws to be aligned with the EU's, or for the EU's institutions, including the Court of Justice, to have any jurisdiction in the UK."*

Predicting anything about Brexit is doomed to fail so, instead, here is a tentative suggestion of what it may mean for copyright. As the UK retreats from the regionalism of the EU, the FTA will likely have little significant to say about copyright and the UK is unlikely to provide significant guarantees to the EU that its regime will remain at the "gold standard" level set by the EU. Further, the cross-border and digital single market-led copyright initiatives introduced by the EU in recent years are unlikely to be maintained in the FTA - for copyright, there will be a "hard" form of Brexit, with the UK being reluctant to give more than the guarantees contained in international copyright law or to commit to maintaining the EU's regime. In the coming years, we will start to see consultations about what "improvements" can be made at a national level to the UK's regime, in exercise of its sovereignty and ability to diverge from the EU. Whether and, if so, how, it should implement the 2019 Directive on Copyright in the Digital Single Market[6] should, it is suggested, be high on that agenda.

"The anticipated FTA is unlikely to replicate significant parts of the EU copyright regime."

As the UK, in the meantime implements its "Global Britain" agenda, seeking trade deals with, for example, the United States, it seems unlikely that the UK will be able to export, or internationalise, any such improvements - this reflects that the UK will often be the junior partner in such deals and any attempts to include meaningful copyright provisions in them will likely be sacrificed in favour of politically more significant gains. Ultimately, in Brexit, if it comes down to fish or copyright, it is likely to be the fish which win the day.

>> Brexit Basics

As a significant part of UK domestic law depended on, and reflected, the UK's membership of the EU, significant changes were needed to ensure that the UK had a functioning statute book ready-to-use for when it left the EU. That is why the EU (Withdrawal) Act 2018 (EUWA) was introduced on 26 June 2018.[7] The EUWA repeals the domestic act (the European Communities Act 1972) through which all EU law took effect in the UK, as of the "exit day". The EUWA also converts EU law, as it stood on exit day, into domestic law. The UK also introduced a series of exit Statutory Instruments **(SIs)** to prepare for a "no-deal" Brexit, which were to have effect from exit day and which "fixed" various problems in UK law caused by the UK no longer being a part of the EU.[8]

After the introduction of the EUWA and the SIs, the EU and the UK reached a deal governing the terms on which the UK would leave the EU - "no deal" was avoided for the time being. On 17 December 2019, the EU and the UK agreed: (i) the Political Declaration **(PD)**[9] which in very broad terms describes the desired future relationship between the EU and the UK and (ii) the Withdrawal Agreement **(WA)**. The WA came into force on 1 February 2020 (Brussels time) and provides for a transition/implementation period during which EU law applies to the UK.

To give effect to the WA, the UK had to enact another law to amend the already-enacted EUWA, which became the EU (Withdrawal Agreement) Act 2020 **(EUWAA)**. EUWAA effected Brexit in the UK on 31 January 2020 (at 11pm UK time): "exit day". Because the EUWA already provided for repealing EU law as of "exit day" (as explained above), EUWAA had to "undo" that and maintain the continuing effect of EU law in the UK until what is known as the IP Completion Day (not short for "intellectual property" but "implementation period" and being the date on which it ends - currently 11pm UK time on 31 December 2020).

It also mass-deferred the introduction of the "exit day" SIs until that day.
This is a long way of saying that, for the remainder of 2020, the entire EU copyright regime[10] continues to apply to the UK.

Three things can happen now that the UK has left the EU:

1. the UK manages to negotiate a FTA with the EU by the current IP Completion Day;
2. no deal additional to the WA is agreed by the IP Completion Day, the EU and UK having been unable to agree their future relationship; or
3. the UK and the EU extend the IP Completion Day until, at the latest, 31 December 2022[11] and try to agree a FTA until then (if they fail again, the UK exists without a deal going beyond the WA).

The UK government is pushing for #1, with #2 as a fall-back, having ruled out #3.[12] There are concerns as to whether #1 is realistic in the time available. In her 8 January 2020 speech (and in answering an audience question),[13] the president of the European Commission noted that the transition period is very tight and that priorities need to be on where, at end of the IP Completion Day, there will not be an international agreement or something else to fall back on, but only a "hard" exit. This is why it is still relevant to look at the "no-deal" Brexit scenarios; the no deal which didn't immediately take place on the UK's exit, as had been feared (or threatened, depending on one's perspective), may effectively happen for copyright on 1 January 2021. The UK government's approach to negotiations (albeit published prior to the escalation in the COVID-19 outbreak) in fact reveals that if, in June 2020, it does not look likely that an FTA will be rapidly agreed by September 2020, the UK will focus solely on "no-deal" domestic preparations to exit the transition period in an "orderly" way.[14] It may, in any case, happen for copyright whether or not there is a FTA in place dealing with other issues because, as will be discussed below, the anticipated FTA is unlikely to replicate significant parts of the EU copyright regime.

With this background in mind, the chapter goes on to analyse the impacts of the UK's retreat from regionalism and its moves to nationalism and internationalism may have on copyright.

"There are a number of important areas of the EU's copyright regime which will not apply or work after IP Completion Day."

1. Retreat from regionalism: The continuing effect of EU law in the UK, with some notable exceptions

The UK's retreat from EU regionalism will not be effortless. This section considers what impact the changes will have on cross-border activity.

The latest guidance (last updated on 31 January 2020)[15] from the UK's Intellectual Property Office (UKIPO) confirms that EU law will continue to operate "as is" until the end of the transition period (being the IP Completion Day). Looking past the transition period, EUWAA ensures that all EU law (as it stands on the IP Completion Day, so including any developments happening between now and the IP Completion Day) will be incorporated into UK law. Therefore, EU copyright law will continue its effect in the UK until the UK decides to diverge from it (see section 2 below on how the UK might do that). However, the cross-border effects of a number of parts of UK/EU copyright law will have no effect from the IP Completion Day and we discuss them below.

The WA is silent on copyright.[16] The UKIPO suggests[17] that is because there are international copyright treaties that ensure continued reciprocal copyright protection, so the WA did not need to address it. Indeed, the fall-back provisions in the international treaties will always remain in the background, as both the UK and the EU are contracting parties to many copyright treaties, like the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Berne Convention for the Protection of Literary and Artistic Works (although the EU is not a party, it is required to apply articles 1-21 and the Appendix of the Berne Convention through article 1(4) WCT).

The European Commission's copyright guidance[18] recognises the fall-back on this international framework after the IP Completion Day regarding, for example, exclusive rights, term of protection, obligations around technological protection measures and rights management information, computer programmes and copyright enforcement. At the same time, however, the guidance rightly cautions that these international agreements do not provide the same type or level of protection as EU law provides now.[19] It seems unlikely that there will be time or political will to bridge this gap in the upcoming negotiations, as priorities will lie elsewhere and there is unlikely to be much UK appetite to commit to maintaining the enhancements relative to that fall-back position in the EU's copyright regime.

This tacit direction of travel is highlighted in a House of Commons Briefing Paper on the UK-EU future relationship negotiations.[20]

There are a number of important areas of the EU's copyright regime which will not apply or work after IP Completion Day (as identified in the UKIPO's post-transition period guidance):[21]

- **Broadcasters: satellite broadcasting and cable retransmissions.** The "country-of-origin" effect of the so-called Sat-Cab Directive[22], that the act of communicating to the public happens only in the EU Member State where the broadcast signals are introduced, will no longer apply to the UK. This means that clearing the act of satellite broadcasting in the UK will not automatically clear rights across the EU after IP Completion Day. Therefore, UK-based broadcasters that provide cross-border satellite broadcasting services across the EU will have to check the position in each EU member state receiving their broadcast to determine whether they need to obtain appropriate licences on receipt. That would be determined in accordance with the applicable domestic legislation dealing with broadcasts originating in non-EU countries (as the UK will become). By way of comparison, for satellite broadcasts originating in the EU, those broadcasters can still avail themselves of country-of-origin licensing as long as (i) the broadcast is not commissioned or uplinked to a satellite in the UK and (ii) it does not originate from a country that provides lower copyright protection (which seems unlikely).

- **Cross-border portability of online content.** The Cross-Border Portability Regulation enables subscribers to certain digital services to access their subscriptions when they are temporarily present in member states other than their place of residence. However, from the IP Completion Day, a UK-residing subscriber will no longer automatically benefit from this "portability" of their digital subscriptions when traveling in the EU – to do so, the providers of their services will need to have secured permissions from rightsholders to continue providing the portable access in the EU and the service providers will no longer be obliged to provide that access. Conversely, as the Regulation will be revoked in the UK, there will be no obligation on services operating in the UK to provide this access to travelling subscribers in the UK.

"First sale of a copyright-protected good in the UK will not exhaust copyright in the EU and separate consent will need to be sought for subsequent distribution of that good in the EU."

- **Collective rights management.** The Collective Management of Copyright Directive[24] obliges collective management organisations (CMOs) to represent another CMO for multi-territorial licensing in the online rights of musical works in certain circumstances. From the IP Completion Day, EU CMOs will not have to do that for UK CMOs (but the UK is unilaterally maintaining the existing obligations on the UK CMOs).

Another (copyright-unrelated, but cross-border and industry-relevant) consequence of Brexit is that Ofcom will no longer be the one-stop-shop regulator for cross-border broadcasters established in the UK.[25] The UK will therefore lose its European hub status in that respect. Unsurprisingly, international broadcasters plan to move away from the UK to elsewhere in the EU to secure the licences for their cross-border services. The EU normally excludes audiovisual services from its FTAs and the European Commission has stressed that the EU will carefully consider any commitment in this sector. The Council's negotiating directives expressly state that audiovisual services should be excluded from the scope of the economic partnership with the UK. Despite this resounding "no" on whether audiovisual services will be included in the FTA, the UK wishfully thinks they "could" be included.[26]

Continuing the list of Brexit consequences is the UK's participation in Creative Europe (the EU's framework programme for supporting the audiovisual, media and creative sectors).[27] The Commission previously encouraged the UK to continue in the successor programme[28] to Creative Europe post-Brexit.[29] The Commission acknowledged[30] that the WA foresees the UK continuing to participate until the current Creative Programme closes in December 2020 and that UK beneficiaries will continue to benefit from the current programme until all the relevant activities are completed (even if that happens post-2020).

Finally, what the WA does mention in the Intellectual Property section is the exhaustion of rights.[31] If copyright is exhausted in both the EU27 and the UK before the IP Completion Day, it shall remain so exhausted thereafter. But, after the IP Completion Day, what happens in the UK is irrelevant for exhaustion in the EU: the rightsholder's consent needs to be sought separately for importation and onward distribution in the EU.[32] The UK has, nevertheless, introduced a "one way" exhaustion regime: for copyright-protected goods put on the market in the EU, the UK will treat the copyright in such goods as exhausted so they can be traded freely in the UK once sold for the first time, by or with the consent of the copyright owner, in the EU. The EU has not introduced an equivalent solution, so first sale of a copyright-protected good in the UK will not exhaust copyright in the EU and separate consent will need to be sought for subsequent distribution of that good in the EU.

2. The impact of nationalism: The potential for further divergence from the EU's copyright regime in the future relationship

The PD sets out in very broad terms the framework for the UK's future relationship with the EU. There is, however, no suggestion that the cross-border regimes mentioned above will be preserved in an FTA. As a result, that relationship insofar as it relates to copyright will consist of a relatively "hard" Brexit. There is also little to suggest that the FTA will contain meaningful commitments on behalf of the UK to maintaining the full extent of the EU's copyright regime. This section will, therefore, explore in which areas the UK may choose to develop its copyright regime away from EU norms.

The UK will remain in the single market until the IP Completion Day. However, after that, the EU is not prepared to let the UK cherry-pick sector-by-sector participation in the Single Market.[33] Neither the PD nor the WA mentions any alignment on the Digital Single Market agenda or the single market more broadly. The EU's copyright regime (particularly the cross-border initiatives mentioned above) has been in part intended to achieve a single market for copyright. As the UK will not be participating in the single market in future, it is no surprise that its copyright aspects will not be preserved following IP Completion Day.

The European Commission's draft negotiating directives (adopted without amendment in this respect by the Council)[34] mention IPR protection that stimulates *"innovation, creativity and economic activity"*, going beyond international treaties but without any more specifics. This wording was taken verbatim from the PD, which also talks of the UK and the EU going beyond the international standards of TRIPS and of the WIPO conventions. But how far beyond, we do not know. The PD further mentions preserving the current *"high levels of protection"*, including regarding certain rights under copyright law (but the PD then goes on to illustrate this point with a right that is not actually copyright law, namely, the *sui generis* database right).

"The cross-border copyright regimes, such as portability and country of origin licensing of satellite broadcasting, will therefore materially change."

The PD clarifies that "*the precise legal form of the*(UK-EU) *future relationship will be determined as part of the formal negotiations"*.[35] Since agreeing the PD, the UK's stance on the FTA has hardened indicating that it has little appetite for alignment and agreeing a "level playing field" and, instead, wishes to preserve as much ability to set its own rules as possible. The UK's approach to negotiations leave us none the wiser in respect of getting clarity on what (if anything) will happen with the UK's copyright regime. It similarly refers to "*high standards of protection for IP rights, including*(…) *copyright"* and exceeding international standards, without further particulars.[36] The UK's copyright regime already exceeds international standards and so, the authors may have thought the high standards exist already, with no further action required.

The cross-border copyright regimes, such as portability and country of origin licensing of satellite broadcasting, will therefore materially change. This is because those regimes were introduced as essentials for creating the EU single market,[37] which the UK is so keen to leave. The UK simply cannot unilaterally decide to give itself access to the single market - one of the EU's priorities is to safeguard the integrity of the single market by not allowing cherry-picked access to it. The UKIPO recognises that the status of these cross-border arrangements depends on what the UK-EU future relationship will look like. The European Commission's copyright notice to stakeholders[38] stresses that the UK will become a "third country" after the IP Completion Day. It would be a surprise if the FTA changed that position.

One significant area of divergence between the UK and EU will arise almost immediately after the IP Completion Day: the Directive on Copyright in the Digital Single Market **(DSM Directive)**.[39] The DSM Directive has to be transposed by Member States by 7 June 2021,[40] which is after the IP Completion Day. Therefore, the EUWAA will not convert the DSM Directive into UK law and it seems unlikely that the FTA will require the UK to do so.

On 21 January 2020, the UK's Minister of State for Universities, Science, Research and Innovation echoed this, but also stated that the UK government has "no plans" to implement the DSM Directive and that "*[a)ny future changes to the UK copyright framework will be considered as part of the usual domestic policy process"*. This means, for example, that there will be no new UK press publication right.

This new 2-year EU copyright-related right was introduced to help press publishers get around enforcement difficulties in the digital environment, to enable them to recoup some of their economic investment. We will have to see whether the UK government actually thinks this is bad policy when its turn comes (if at all) under the usual[42] domestic policy process. The same goes for the other provisions of the DSM Directive. We have already, for example, seen the UK music industry request that the UK government implement the DSM Directive in any case[43]. This lobbying worked (somewhat). The UK's (then new) Minister acknowledged the music creator's concerns of getting fair remuneration and said that "*[t)he UK copyright framework must provide fair rewards for creators in the online ecosystem"*, but still distanced the UK from implementing the DSM Directive.[44] If this will be implemented through a DSM replica or in some other way, we do not know. The UK may adopt a "wait and see" approach, so it can learn the lessons from the EU's implementation. This is the approach that Canada's House of Commons Standing Committee on Industry, Science and Technology[45] recommends in the context of article 17 of the DSM Directive.

Other than not implementing future EU legislation, the UK could further diverge by un-doing decisions of the Court of Justice of the European Union **(CJEU)**. Previously, under the EUWA, it was envisaged (for our purposes) that only the UK Supreme Court could undo the CJEU decisions that will be converted into UK law at the IP Completion Day (or the UK parliament, in exercising its brought-back sovereignty, could legislate away from the CJEU decisions). However, the EUWAA[46] amended the EUWA[47] to provide for the possibility that any court or tribunal could depart from retained CJEU decisions if a minister mandates it before the IP Completion Day. Whether that happens or not, it remains to be seen, but the minister would have to consult with the President of the Supreme Court and with the Lord Chief Justice of England and Wales, amongst others (which provides a modicum of comfort that the consequences of such a mandate would be properly considered).

Departures from CJEU jurisprudence would not come as a big surprise, as the UK government has repeatedly said it does not want any kind of alignment with CJEU decisions or CJEU jurisdiction in the future. To give a couple of examples, the UK may want to divert away from the recent CJEU decision in *Cofemel*,[48] which indirectly questioned (i) whether the UK's closed list approach for copyright subsistence is correct; (ii) whether section 51 of the UK

"It is probably safe to say that Brexit leaves the UK entertainment industry in a worse place than before."

statute is valid; and (iii) whether a UK Supreme Court decision is correct.[50] Commercially, this divergence could mean more copyright protection in the EU than in the UK.

In a similar vein, the UK might want to end the once-hot debate about what the right test for copyright originality is and let go of the EU approach,[51] which first surfaced in *Infopaq*[52] (in the context of the Copyright Directive) and then carried on in *Painer*[53] and subsequent CJEU decisions ever since. Commercially, this divergence could mean more copyright protection in the UK than in the EU. Whether it is a good idea to diverge is another matter but this option is available to the UK after the IP Completion Day (as long as the UK does not breach any of its international copyright treaties obligations or anything coming out of the UK-EU negotiations while doing so). One area where the UK might not want to diverge due to international obligations is whether there is "digital exhaustion" enabling resale of digital content (in the Tom *Kabinet*[54] decision the CJEU decided that there is no such exhaustion and based part of its reasoning on the WCT).

3. The impact of internationalism: How the UK's participation in free trade agreements may reshape its copyright regime

One element in UK's *"taking back control"* dynamic was the opportunity for the UK to have an "independent trade policy" and strike free trade agreements with trading partners further afield than the EU. In his 3 February 2020 Greenwich speech, UK's Prime Minister said the UK "*want*(s) *a comprehensive free trade agreement, similar to Canada's"*,[55] but did not rule out one similar to Australia's either (which is still being negotiated). According to him, this is a part of the UK's ambition to have a global perspective, especially because now *"global free trade needs a global champion"*.
It remains be seen how much of this will be put in practice and how much is hollow rhetoric, especially as Brexit meant the UK mechanically left around 600 international agreements when it left the EU.[56] For our purposes, this section briefly looks at what impact FTAs could have on UK copyright and how the UK copyright regime could influence those FTAs, with a particular focus on the CETA, AUSFTA[57] and the CPTPP[58] agreements.
In brief, the answer is probably "not much". The UK (also thanks to its EU membership) has developed in the last thirty years a state-of-the-art copyright regime, which is in many respects above the curve of other FTAs. For example, CETA (the UK-desired model) is nowhere near establishing a single (digital) market and is unhelpful in providing clarity on the uncovered ground discussed in section 1. The copyright and related rights provisions[59] are sparse compared to what the UK has now in place with the EU. CETA covers: broadcasting and communication to the public of performance and equitable remuneration for commercial use; protections for technological measures and rights management information; limited liability for intermediary service providers and camcording.

Neither the AUSFTA, nor the CPTPP seem to bring anything necessarily novel. They both refer to the already-mentioned international agreements and cover, for example, exclusive rights, term of protection, technological protection measures and rights management information.Interestingly, they both cover legal remedies and safe harbours regarding internet service providers,[60] but that is something that the UK copyright system is already well acquainted to.

What is most notable is that the current challenges and opportunities for international copyright regimes, for example artificial intelligence[61], are not addressed in these FTAs. Indeed, it is likely that this is one area in which the UK will want to preserve sovereignty. There was some indication while Theresa May was UK Prime Minister that her administration was looking to diverge from the EU so they could be more ambitious on areas such as regulation of AI. Other things have since taken priority so we do not have any specific indication of the UK government's current position. However, when time allows and in light of the desire for the UK to take advantage of its opportunity to "get(our) own rules right in a way that suits our own conditions",[62] there will be political will to make relatively grand policy announcements on these sorts of areas and that policy is likely to be made, at least initially, at a national level.

We were, however, given an insight into the UK government's ambitions in respect of securing an FTA with the US[63] and copyright is part of the UK's "strategic approach" in developing a "world-class" IP chapter in the FTA.[64] The UK government wants copyright provisions that ensure an effective and balanced global framework that supports the UK's creative industries,[65] innovative digital businesses and the "industries of the future", focusing on cutting-edge digital trade provisions.[66] However, the government wants to balance fair remuneration for creators and fair content access. The public consultation also revealed, somewhat reassuringly, that at least some of the respondents have copyright on their minds. The sense was that the UK should maintain its strong copyright

regime and that the US system is weaker, for example, regarding fair use and safe harbour provisions.

>> Where does Brexit leave the entertainment industry?

It is probably safe to say that Brexit leaves the UK entertainment industry in a worse place than before (at least in the short-term looking only at copyright and before considering issues such as the increasing difficulty travelling musicians will have to access the UK). The fact that the UK copyright system is, at the moment, in a good place nationally, regionally and internationally cannot compensate for the fact that the UK will be shut off from the Digital Single Market, which will continue to develop without the UK in it. But, this retreat from regionalism was the UK's decision and, as the president of the European Commission put it, "with every decision, comes a trade-off". Time will tell how significant this trade-off will be for the UK in the long term and whether copyright (and the entertainment industry as a whole) will be seen to be more important than fish.

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[1] *The UK government's desire to diverge was echoed in its published approach to the negotiations, which went to great lengths to emphasise that the UK wants to retain the ability to diverge (but whether or not it will actually use it, remains to be seen):*

The UK government ruled out pursuing anything more than an FTA, for example, a customs agreement/union or EEA/EFTA membership and it is pushing for a Canada-style FTA, see 8 January 2020 press release: https://www.gov.uk/government/news/pm-meeting-with-eu-commission-president-ursula-von-der-leyen-8-january-2020.

[2] *One may justifiably wonder what use a blue passport is when, as a Brit, one is stuck in the "rest of world" immigration queue at Nice airport while colleagues from EU member states are already on La Croisette in Cannes enjoying their rosé.*

[3] *UK government guidance on "Changes to copyright law from 1 January 2021" https://www.gov.uk/guidance/changes-to-copyright-law-after-the-transition-period(accessed 23 February 2020).*

[4] *David Frost's speech at ULB Brussels University on 17 February 2020 https://blogs.spectator.co.uk/2020/02/full-text-top-uk-brexit-negotiator-david-frost-on-his-plans-for-an-eu-trade-deal/(accessed 23 February 2020).*

[5] *The Future Relationship with the EU: The UK's Approach to Negotiations: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf. (accessed 6 March 2020)*

[6] *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.*

[7] *See the Explanatory Notes for EUWA, in particular notes 10 and 12.*

[8] *For example, the Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019/605 - see explanatory note at https://www.legislation.gov.uk/uksi/2019/605/note/made.*

[9] *Which is not legally binding, but the WA refers to it (see, for example, article 184).*

[10] *Comprising of 11 directives and two regulations: https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation.*

[11] *The WA allows for an extension of the transition period for up to one or two years.*

[12] *Section 33 EUWAA prohibits the UK government from agreeing an extension of the transition period (although a further act of parliament could override it, if there was political will to do so). The UK Prime Minister has, at the time of writing, said that there is "no talk" of there being an extension even in light of the COVID-19 outbreak.*

[13] *Speech by President von der Leyen at the London School of Economics on 'Old friends, new beginnings: building another future for the EU-UK partnership', https://ec.europa.eu/commission/presscorner/detail/ET/speech_20_3.*

[14] *See(9), n5.*

[15] *Intellectual property and the transition period, https://www.gov.uk/government/news/intellectual-property-and-the-transition-period.*

[16] *As is the European Commission's Questions and Answers on the United Kingdom's withdrawal from the European Union on 31 January 2020: https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_104.*

[17] *See n18.*

[18] *European Commission's Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of Copyright, 22 November 2019, https://ec.europa.eu/info/sites/info/files/file_import/copyright_en_0.pdf.*

[19] *See, for example, recitals (16) and (17) on the international framework, as compared to recitals (4), (21), (23), (25), (26), (28), (29), (31), (32) and (47) on the EU add-on from Directive 2001/29, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001L0029.*

[20] *See page 18, Briefing Paper Number 08834, 2 March 2020: https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8834.*

[21] *Guidance: Changes to copyright law from 1 January 2021, https://www.gov.uk/guidance/changes-to-copyright-law-after-the-transition-period.*

[22] *Council Directive 93/83/EEC.*

[23] *Regulation (EU) 2017/1128.*

[24] *Directive 2014/26/EU.*

[25] *The Audiovisual Media Services Directive (2010/13/EU) on which Ofcom depends in this regard will no longer apply.*

[26] *Chapter 15, n5.*

[27] *https://ec.europa.eu/programmes/creative-europe/node_en.*

[28] *The current one ends on 31 December 2020.*

[29] *Membership is open to non-Member States, see article 8 of EU Regulation 1295/2013.*

[30] *See the Commission's 3 February 2020 notification under article 8 of EU Regulation 1295/2013, https://eacea.ec.europa.eu/creative-europe/library/eligibility-organisations-non-eu-countries_en.*

[31] *This is covered in Part III, Title IV of the WA in articles 58 and 61 respectively, both of which take effect from the end of the transition period pursuant to article 185 WA.*

[32] *UKIPO's Exhaustion of IP Rights and parallel trade from 1 January 2021 Guidance, https://www.gov.uk/guidance/exhaustion-of-ip-rights-and-parallel-trade-after-the-transition-period.*

[33] *See, for example, paragraph 7 of the European Council's 23 March 2018 guidelines (available here: https://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf). The EU has been very transparent and has published many negotiating documents online including internal EU27 seminar slides like the ones from 13 January 2020 where no sector-by-sector cherry picking is mentioned again (see link here: https://ec.europa.eu/commission/publications/slides-internal-eu27-preparatory-discussions-future-relationship-free-trade-agreement_en).*

[34] *See(50) -(53) of the Directives for the Negotiation of a New Partnership with the United Kingdom of Great Britain and Norther Ireland, 25 February 2020, https://www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf.*

[35] *[18) PD.*

[36] *See(71), n5.*

[37] *See, for example, recitals (33) of Directive 2010/13 and (2), (3) and (5) of Directive 93/83 and the policy statements on the European Commission's website: https://ec.europa.eu/digital-single-market/en/policies/copyright; https://ec.europa.eu/digital-single-market/en/satellite-and-cable-directive and https://ec.europa.eu/digital-single-market/en/cross-border-portability-online-content-services.*

[38] *See n22.*

[39] *Directive 2019/790, https://eur-lex.europa.eu/eli/dir/2019/790/oj.*

[40] *Article 29 DSM Directive.*

[41] *Department for Business, Energy and Industrial Strategy, Copyright: EU Action: Written question - 4371, https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-01-16/4371.*

[42] *Although the UK-EU future negotiations will mostly likely significantly delay this "usual" process.*

[43] *See, for example, UK Music's letter to the Minister following his announcement: https://www.ukmusic.org/assets/general/Jan2020CopyrightDirective.pdf*

[44] *As reported here: https://completemusicupdate.com/article/uk-music-welcomes-governments-albeit-loose-commitments-on-copyright-reform/.*

[45] *Standing Committee on Industry, Science and Technology, "Statutory Review of the Copyright Act" (June 2019), page 83, https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf.*

[46] *Section 26 EUWAA.*

[47] *Section 6 EUWA.*

[48] *Case C-683/17 (and its predecessor Levola Hangelo, Case C-310/17).*

[49] *The Copyright, Designs and Patents Act 1988.*

[50] *For a detailed analysis, see the 9 January 2020 Taylor Wessing article: https://united-kingdom.taylorwessing.com/en/news/important-cjeu-ruling-could-mean-copyright-protection-is-available-for-all-original-designs?utm_source=Team&utm_medium=social&utm_term=Team&utm_content=news&utm_campaign=cofemel-jan20*

[51] *Although doubts have been cast on whether the difference in the tests actually make a difference or if it is just a matter of semantics - see Action Storage Systems Ltd v G-Force Europe.Com Ltd(2016) EWHC3151 (IPEC),(21)-[22).*

[52] *Case C-5/08.*

[53] *Case C-145/10.*

[54] *Case C-263/18, where the CJEU ruled that re-sale of e-books is not permitted without the authorisation of the copyright owner because it infringes the right of communication to the public, even though it does not engage the distribution right (meaning there can be no digital exhaustion permitting the re-sale of a downloaded e-book).*

[55] *PM speech in Greenwich: 3 February 2020, https://www.gov.uk/government/speeches/pm-speech-in-greenwich-3-february-2020.*

[56] *Michel Barnier's remarks at the European Commission Representation in Sweden on 9 January 2020, https://ec.europa.eu/commission/presscorner/detail/en/statement_20_13.*

[57] *Australia-United States Free Trade Agreement, Chapter 17, Intellectual Property Rights, https://dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement/Pages/chapter-seventeen-intellectual-property-rights.aspx.*

[58] *Chapter 18, Intellectual Property, Section H: Copyright and Related Rights, https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/18.-Intellectual-Property-Chapter.pdf.*

[59] *CETA, Sub-section A of Chapter 20, articles 20.7 - 20.12, https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/.*

[60] *See Section J of CPTPP and Article 17.11 of AUSFTA.*

[61] *See, for example, WIPO's Call for Comments on the Impact of Artificial Intelligence on IP Policy, which closed on 14 February 2020 https://www.wipo.int/about-ip/en/artificial_intelligence/call_for_comments/*

[62] *As noted in David Frost's speech mentioned above.*

[63] *See the Department for International Trade's UK-US Free Trade Agreement, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869592/UK_US_FTA_negotiations.pdf.*

[64] *Intellectual Property, page 21, n62.*

[65] *Page 10, n62.*

[66] *Digital, page 18, n62.*