

UK sovereignty: A challenge for the creative industries

Martin Kretschmer

The UK government claims that Brexit will open up “significant opportunities” for the UK. Under their latest three word strapline, [Check, Change, Go](#), a new campaign aims to prepare the UK for the end of the “transition period” on 31 December 2020. In line with messaging guidance, the word Brexit is not mentioned once. Rather: “The campaign will ensure we are all ready to seize the opportunities available for the first time in nearly fifty years as a fully sovereign United Kingdom.”

What is the room for manoeuvre for the UK as a sovereign country? And what will the end of the transition period imply for the creative industries? In this blog, I will discuss three aspects relating to intellectual property law, in the context of the wider legal order.

- (1) The effects of the UK falling out of the single market;
- (2) future regulatory competition with the EU and other trading partners; and
- (3) UK constitutional implications.

The country of origin principle, and EU unitary rights

For the UK government, restoring sovereignty means leaving the EU single market and customs union, and replacing it with a Free Trade Agreement (FTA), and indeed other FTAs with countries such as the US, Japan, Australia and New Zealand. This entails abandoning key concepts of EU market integration that did not require full legal harmonisation, but enabled borderless trade in goods and services. These include the principle of “mutual recognition” and the “country of origin” principle.

The elegance of these principles is that businesses only have to comply with local regulations, or in certain circumstances need to clear rights only in the origin country, while still being able to offer products across the entire internal market. To give one example: In the post-Brexit world, UK firms providing e-commerce, advertising or audio-visual services into the EU will fall under the jurisdiction of each individual EU Member State, and will have to clear multiple regulatory hurdles. Previously, compliance with UK law was sufficient for market access. Vice versa, EU companies will no longer be able to provide services in the UK intended for EU audiences (e.g. via [Satellite broadcast decoder devices](#)). The UK general public may see an early effect on the football screens in pubs and hairdressers.

Leaving the internal market, the UK will also leave behind unitary EU intellectual property rights (such as 1.4 million registered [EU Trade marks](#)) which become effective across all Member States with one application, or automatically (in the case of unregistered [EU Design Rights](#) or the sui generis [Database Right](#)). While the UK has provided that registered EU Trade marks and Design rights will be unilaterally [converted](#) into comparable UK rights with effect of 1 January 2021, this of course cannot happen in the other direction. EU regional Exhaustion also will no longer apply. After the end of the transition period, an intellectual property right will not be exhausted if a good protected by that right has been lawfully put

on the market in the UK. That is, the good cannot be automatically distributed across the EU.

Both of these fundamental changes (to the country of origin and intellectual property rights structure) require that all UK creative industry firms with EU exposure will need to reconfigure their regulatory compliance and intellectual property strategy. This is clearly a major cost to businesses. They need to audit current arrangements, and they will find future business with the EU more cumbersome. But reconfiguration also may carry opportunities.

Regulatory divergence and regulatory competition

According to the UK government, the main opportunity of Brexit lies in regulatory divergence, creating an environment more conducive to innovation (cf. [Pisani-Ferry 2020](#)). This may lead to the development of new products and services “stifled” by current EU regulations, and perhaps also attract inward investment.

I have discussed [copyright law](#) as an early example of regulatory divergence when the issue emerged in January 2020. The UK government [announced](#) that it had no intention to implement the [Directive on Copyright in the Digital Single Market](#), even though it had voted for the EU legislation in [Spring 2019](#). The Directive includes a controversial change to the liability regime of platforms that host user-uploaded content. Article 17 (formerly 13) creates a new category of ‘online content sharing service provider’ that will no longer benefit from the ‘safe harbour’ of the [e-Commerce Directive](#), a core piece of internet legislation adopted in the year 2000. The e-Commerce Directive exempts platforms from liability for unlawful content found on their services (if removed “expeditiously” following notice).

Boris Johnson (then out of government) had [tweeted](#) during the European legislative process on 27 March 2019: “The EU’s new copyright law is terrible for the internet. It’s a classic EU law to help the rich and powerful, and we should not apply it. It is a good example of how we can take back control”.

So let’s explore for a moment platform regulation, an issue of strategic interest to the creative industries as their content and services move online. What could an independent UK trade policy achieve here?

Under the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom ([2019/C 384 I/02](#)), both parties are committing to a “level playing field for open and fair competition” (paragraph 77). Since this a key section of the Declaration, it is worth quoting in full:

“Given the Union and the United Kingdom’s geographic proximity and economic interdependence, the future relationship *must* [emphasis added] ensure open and fair competition, encompassing robust commitments to ensure a level playing field. The precise nature of commitments should be commensurate with the scope and depth of the future relationship and the economic connectedness of the Parties. These commitments should

prevent distortions of trade and unfair competitive advantages. To that end, the Parties should uphold the common high standards applicable in the Union and the United Kingdom at the end of the transition period in the areas of *state aid, competition, social and employment standards, environment, climate change, and relevant tax matters* [emphasis added]. The Parties should in particular maintain a robust and comprehensive framework for competition and state aid control that prevents undue distortion of trade and competition; commit to the principles of good governance in the area of taxation and to the curbing of harmful tax practices; and maintain environmental, social and employment standards at the current high levels provided by the existing common standards. In so doing, they should rely on appropriate and relevant Union and international standards, and include appropriate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement. The future relationship should also promote adherence to and effective implementation of relevant internationally agreed principles and rules in these domains, including the [Paris Agreement](#).”

The areas singled out below the “must” language of a “level playing field” are “state aid, competition, social and employment standards, environment, climate change, and relevant tax matters”.

Platform regulation, as well as many aspects of intellectual property and e-commerce law, seems to offer more room for flexibility. For example, liability standards in the UK could be different. This could make it more or less attractive for Platforms to locate in the UK. Interventions could increase or decrease the bargaining and licensing position of the creative industries. On the other hand, Platforms by their very nature operate across borders, which may indicate that transnational regulatory coordination is needed.

The need for cross-agency and international collaboration is acknowledged in the recent report by the UK Competition and Market Authority (CMA) (1 July 2020): [Online platforms and the digital advertising market](#). The report recommends the establishment of a Digital Market Unit (DMU) with powers to “compel information from SMS [strategic market status] firms and other market participants; carry out own-initiative investigations and investigations stemming from complaints; put in place rapid interim measures pending the outcome of an investigation (...) co-ordinate and share information with UK regulators such as CMA, ICO [Information Commissioner’s Office] and Ofcom, and with overseas authorities with similar objectives (...) (p. 348).”

I don’t have space in this overview blog to discuss these matters in detail. The AHRC [Creative Industries Policy & Evidence Centre](#) (PEC) will publish a more strategic assessment of Platform Regulation (based on my [current work with Prof. Philip Schlesinger](#)) and of the scope for an independent trade policy during the autumn (also as part of its [international competitiveness](#) workstream led by Prof. [Giorgio Fazio](#) from Newcastle University).

As a starting point, businesses in the creative industries should read the notices offered by both the [EU](#) and the [UK](#) on their respective understanding of the situation after the end of the transition period. Some of these assessments may change, if Free Trade Agreements are

concluded successfully, but together they clearly signal where regulatory scope is likely to shift.

UK constitutional implications

I now turn briefly to an underexplored implication of the end of the transition period. There will be several immediate and quite strange effects on the constitutional settlement of the UK.

The [European Union \(Withdrawal Agreement\) Act 2020](#) converted existing EU Law into UK Law. The status of this “retained” law is unresolved. How is the UK going to work out its relation with retained EU Law? How will you know if an earlier precedent from a higher domestic Court relied on EU Law? How does the UK respond to evolving interpretations of retained law from the CJEU? How will lower Courts deviate, as the Withdrawal Act appears to encourage in [section 26\(1\)](#): “a relevant court or relevant tribunal is not bound by any retained EU case law”.

A further coming intervention is the leaked [UK internal market bill](#) that will allow the UK government to set food and environmental standards. That is, regulatory variation in Scotland, Wales, Northern Ireland, as currently exists for example for the sale of alcohol or plastic bags, will become UK reserved matter again. This is designed to give the UK room for negotiating Free Trade Agreements with third countries which the Westminster government will be able to implement centrally across the UK market. If the legislation passes, this is a loss of sovereignty for the UK constituent nations. Trade always involves such trade-offs.

While these specific tensions do not concern the creative industries directly, constitutional uncertainty will amplify the different cultural policies already pursued by the UK’s devolved governments.

Sovereignty and transnational rules

In conclusion, sovereignty always is in tension with transnational rules, such as the “level playing field” commitments articulated in the Political Declaration, the “enhanced equivalence” negotiations in the regulation of [financial services](#), or the authorities of the UK’s devolved governments. No country can unilaterally decide what standards are acceptable to achieve or maintain access to other markets. For example, if the EU (as a bloc) is not willing to change its standards, or the processes by which new standards are adopted, the UK will need to shadow many EU rules to achieve equivalence. This is the first loss of sovereignty.

It is possible to fudge the language in which this shadowing is done. For example, it can be presented as a sovereign decision of the UK, which could take a different course at any time. As floated recently in the [Spectator](#), such a potential compromise may be on offer. A deal could declare that the UK has the sovereign right to move away from the EU’s level playing

field should it so choose. But the underlying logic will not change. Less equivalence, less market access.

A second inevitable loss of sovereignty involves the resolution of disputes over agreed common standards. Here it is the UK's position that a dispute resolution body cannot involve the Court of Justice of the European Union (CJEU). Arguably, the arbitrator should be seen to be independent of the parties to a dispute. On the other hand, any arbitration body would not have the jurisdiction to interpret autonomous EU concepts. Ensuring a harmonised interpretation across 27 Member States is the role of the CJEU. While the issue of the Court of Justice is specific to the UK-EU negotiations, the two types of losses to sovereignty (common standards, dispute settlement) will surface in all Free Trade Agreements currently under negotiation. For the creative industries, the concern should not be the loss of sovereignty but ensuring maximum market access while fostering appropriate domestic capability and innovation.

Links:

European Commission: Getting ready for changes: Communication on readiness at the end of the transition period between the European Union and the United Kingdom ([Brussels, 9.7.2020 COM\(2020\) 324 final](#))

In particular, I recommend considering the notices on [Copyright](#), [Data protection](#), [E-commerce](#), [Exhaustion of intellectual property rights](#), [Geo-blocking](#), [Trade marks and Designs](#).

United Kingdom: From the UK perspective, important entry points to information about the end of the transition period are offered by various government departments and agencies:

<https://www.gov.uk/government/collections/brexit-guidance-for-dcms-sectors>

<https://www.gov.uk/guidance/ecommerce-directive-what-online-service-providers-in-the-uk-should-do-to-get-ready-for-brexit>

<https://www.gov.uk/guidance/changes-to-copyright-law-after-the-transition-period>

<https://www.gov.uk/guidance/eu-trademark-protection-and-comparable-uk-trademarks>

<https://www.gov.uk/guidance/changes-to-eu-and-international-designs-and-trade-mark-protection-after-the-transition-period>

<https://www.gov.uk/guidance/exhaustion-of-ip-rights-and-parallel-trade-after-the-transition-period>

<https://ico.org.uk/for-organisations/data-protection-at-the-end-of-the-transition-period/>

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