



Brexit: the clock ticks

Introduction

'Brexit' poses considerable challenges for intellectual property law and presents uncertainty as to the involvement of the UK, following its exit from the EU, in existing and proposed international regimes involving European Union (EU) law.

In March 2018, the text of a draft "partial agreement" was published¹. It indicates that, assuming the UK and the EU reach agreement on the terms of the UK's withdrawal from the EU, this will include a 'transition period' lasting from 29 March 2019 until 31 December 2020. During the transition period (if agreed) the *status quo* would largely remain in place for intellectual property. The relationship between the UK and the EU beyond 2020 remains a matter of negotiation.

In the absence of agreement being reached for a transition period, or upon the expiry of any agreed transition period without agreement as to arrangements beyond that date, the UK Government has indicated that it intends to preserve the *acquis* - the existing body of EU law - in the national law of the UK.

In many areas of the law, the preservation of the *acquis* would prevent a substantive change to the applicable law, or some sort of legislative 'gap', from arising in the UK; However, the UK's involvement in pan-EU regimes - for example, in respect of customs, jurisdiction and enforcement of judgments and unitary intellectual property rights - cannot be preserved unilaterally by the UK. It may be possible for the UK to remain within such systems but only if appropriate agreement is reached with the EU. To the extent this does not happen, national legislation would be expected to safeguard, in practical terms, many of the key rights presently enjoyed by EU-wide intellectual property right holders in the UK pursuant to EU legislation.

This article, therefore, seeks to indicate, for intellectual property law, the areas in which reaching agreement should be a priority for both the EU and the UK, as well as areas in which both parties would benefit from a collaborative and constructive approach to the negotiations.

In addition, and in the meantime, with a view to ensuring as smooth a transition as possible upon exit from the EU, this article seeks to identify which areas of intellectual property law need legislative enactment, both to preserve the *acquis* and, where this is not possible, to provide replacement legislation creating equivalent national regimes (and, as appropriate, providing for the transitioning of existing rights into such regimes).

¹ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, of 19 March 2018, updated by a joint statement from the negotiators of the European Union and the United Kingdom government on progress of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, of 19 June 2018.

Brexit means Brexit

On 29 March 2017, the UK delivered to the European Council, in accordance with Article 50(2) of the Treaty on European Union (TEU), notice of its intention to withdraw from the European Union.

Article 50 states as follows:

- (i) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
- (ii) A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
- (iii) The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
- (iv) For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
- (v) If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49.

There is uncertainty as to whether a notice under Article 50 may be withdrawn. Some commentators, including Lord Kerr, who is credited with having drafted the text of Article 50, have opined that the UK could unilaterally revoke its notice. Other commentators, not least the European Parliamentary Research Service², have opined that this is at least doubtful from a legal point of view. In any event, it is the Court of Justice of the European Union (CJEU) that would have the final say in the event of a dispute as to the legality of any attempt by the UK to revoke its Article 50 notice.

What is clear is that the event triggering the withdrawal of the UK from the EU is the UK's 29 March 2017 notice, unless an agreement to the contrary is reached between the UK and the EU.

As mentioned above, the nature of the UK's relationship with the (remaining) EU following Brexit remains the subject of negotiations between the UK and the EU. In June 2018 an update on progress was published, with reference to the March 2018 published text. This indicates that, provided agreement is reached, and although the UK will exit the EU on 29 March and from that date will no longer participate in EU decision making processes, EU law will very largely remain applicable to and in force in the UK for the term of a "transition period", which will end on 31 December 2020. For the term of the transition period the UK would remain within the EU's intellectual property regimes, i.e. postponing the *status quo* until the end of 2020.

² Article 50 TEU: Withdrawal of a Member State from the EU, EPRS, February 2016 [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI\(2016\)577971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf)

If no agreement is reached, Brexit will occur on 29 March 2019 without arrangements being in place for the UK's orderly withdrawal or the ongoing relationship between the UK and the EU.

The status of EU law in the UK

It is perhaps worth noting that EU law is incorporated into the law of the UK by statute.

The framework statute is the European Communities Act 1972, which was enacted in the course of the UK's ratification of the 1972 Accession Treaty, according to which the UK became a member of the (then named) European Economic Community.

The European Communities Act 1972 (as amended) establishes EU law into the law of the UK by the following general provisions:

- Section 1, which defines the treaties that govern UK membership of the EU (the EU Treaties);
- Section 2, which provides that EU law in EU Treaties and EU legislation passes into law in the UK either directly through the medium of section 2(1) or pursuant to the implementing mechanism of section 2(2); and
- Section 3, which provides that any question as to the meaning or effect of the EU Treaties or any EU legislation shall be treated as a question of law and (if not referred to the CJEU) for determination as such in accordance with the principles laid down by and any relevant decision of the CJEU; and that judicial notice shall be taken of the EU Treaties and of any decision of, or expression of opinion by, the CJEU on any such question.

Independent of statute, EU law has no status in UK law³. Accordingly, repeal of the European Communities Act 1972 (ECA 1972) would remove from the body of UK law all EU treaties, all directly effective EU legislation, and the requirement that the national courts interpret any legislation (including provisions of national law derived from EU Directives) in accordance with the jurisprudence of the CJEU.

Primary national legislation passed in order to implement EU legislation pursuant to the implementing mechanism of section 2(2) of the European Communities Act (in practice, national legislation implementing EU Directives) would remain in force in the UK, unless specifically repealed; secondary national legislation would not.

In the event the contemplated transition period is agreed upon, an Act of Parliament would be required to preserve, to the extent agreed upon, the effect of EU law in the UK for the term of the transition period.

If no transition period is agreed upon, or upon its expiry, national legislation and/or legislative provision would be necessary to prevent gaps arising in the UK's legislative framework by a blanket repeal of the directly effective legislation presently in force in the UK pursuant to section 1 ECA 1972. The Government has stated its intent to convert the *acquis* in this way⁴.

However, to the extent that the *acquis* establishes reciprocity of rights and obligations as between the law in the UK and the law in other EU member states, it will not be possible for the UK unilaterally to preserve this. Agreement would need to be reached with the EU enabling the UK to remain within the relevant system, and in all likelihood maintaining the role of the CJEU's jurisprudence, and potentially the jurisdiction of the CJEU also, in respect of the UK's involvement in each relevant system.

³ *R (Miller & Ors) v Secretary of State for Exiting the European Union* [2017] UKSC 5

⁴ The United Kingdom's exit from, and new partnership with, the European Union, section 1.1

This is the position, for example, with respect to the provision in EU treaties for free movement of goods and services, the EU Customs regime, the 'Recast Brussels' Regulation (no. 1215/2012 as amended) and the unitary EU regimes for registered trademarks, Community designs, Community plant variety rights, geographical indications, and protected designations of origin. Without such arrangements, each relevant regime would cease to cover the UK; in such a scenario, it is for the UK to legislate to minimise the disruption caused by the UK's exit from the EU.

A stated intention of the UK Government is to bring to an end the jurisdiction in the UK of the CJEU⁵. The EU (Withdrawal) Bill envisages the interpretation of EU law as being unmodified on the day after Brexit, meaning that the *acquis* (i.e. the CJEU's case law) would continue to be applied by the courts in the UK. However, the UK Supreme Court would not be bound by the CJEU's jurisprudence and could depart from it in circumstances in which it could depart from its own case law. Subsequent case law from the CJEU would not bind the courts in the UK, but the UK courts may have regard to it and, in practice, the case law of the CJEU would be likely to remain persuasive⁶.

Interesting questions arise in respect of legislative provisions and common law principles predating EU harmonisation, where the CJEU's jurisprudence has subsequently altered the interpretation of the UK legislation or the approach of the common law. Where appellate court guidance binds lower courts to the harmonised approach, it may take some time for the correct post-Brexit approach to be settled.

The legislative context of intellectual property law

Intellectual property is not an isolated subset of UK law; it forms an important part of the complex mesh of interrelating legislative and common law regimes which together provide the legal structure enabling business and commerce to thrive in the UK.

The regimes considered in this section are established by EU treaties and directly effective legislation. They provide for unitary regimes entailing reciprocity of rights and obligations across and between the Member States of the EU. Without a negotiated arrangement by which the UK would remain within any such regime, each will cease to include the UK upon Brexit (or, if agreement for the transition period is reached, upon the expiry of the term of the transition period).

The remainder of this section considers what the law in the UK would be, and what would be needed by way of national legislation in the UK, in the event the UK exited each relevant regime upon Brexit (or expiry of the transition period). The subsequent sections of this paper then consider the impact of Brexit for specific areas of intellectual property law.

Free movement of goods and services and exhaustion of intellectual property rights

The principle of free movement of goods and services is enshrined in the EU treaties. It is complemented by the case law of the CJEU and by legislation in respect of particular intellectual property rights which provide, in general, for regional exhaustion of intellectual property rights. Accordingly, the placing of goods on the market in the European Economic Area (EEA or single market) by the owner of the relevant intellectual property, or with his consent, generally exhausts the proprietor's ability to enforce his intellectual property in those goods to prevent re-sale⁷.

⁵ The United Kingdom's exit from, and new partnership with, the European Union, section 2.3

⁶ Arnold, R., Bently, L., Derclaye, E. & Dinwoodie, G., *Judicature, The Legal Consequences of Brexit through the Lens of IP Law*, 2017

⁷ See for example *Centrafarm B.V., Rotterdam and De Peijper, Nieuwerkerk a/d IJssel v. Sterling Drug Inc.* Case 15/74, *Silhouette International Schmied GmbH & Co. KG v Hartlauer Handelsgesellschaft mb*, Case C-355/96 and subsequent jurisprudence

Outside the single market, upon the expiry of any agreed transition period and save to the extent agreement to the contrary is reached between the UK and the EU, the UK will be able to legislate for a new scope of geographical exhaustion of intellectual property rights. If no legislation is passed setting the scope, it will be a matter for the courts of the UK.

What are the legislative options? The UK's legislature could provide for any of the following:

- to restrict the scope of exhaustion to a domestic scope. Such an approach could help rights owners to segregate the UK from existing geographically linked markets and to maintain the international value of goods placed on the market in the UK; but such an approach may not assist the UK government in keeping domestic price inflation down;
- to continue to apply EU and EEA-wide regional exhaustion; but absent agreement between the UK and the EU, this would not be reciprocal (i.e. the EEA would not consider rights in goods placed on the market in the UK to be exhausted in respect of the EEA). Such an approach would help to encourage the parallel import of goods into the UK from the remaining EU following Brexit, and assist in deterring rights owners from artificially inflating the cost of goods placed on the market in the UK;
- to create an international exhaustion regime, so that the placing of goods on the market anywhere in the world by the proprietor or with his consent exhausts the proprietor's ability to enforce his intellectual property in those goods subsequently in the UK. This option would seem least favourable to rights owners and potentially most favourable to parties interested in keeping consumer prices in the UK as low as possible.

What would the courts in the UK do if there were no legislation on exhaustion?

If the UK exits the EU (and the single market) without national legislation being put in place defining the intended geographical scope of exhaustion of intellectual property rights, the law in the UK can be expected to be developed by the courts in the tradition of the common law. There is some history of international exhaustion in the jurisprudence of England and Wales - before the UK's accession to the European Economic Community (the predecessor to the EU), legal tests focused on consent and, in some areas (such as passing off), the case law was very sparse. The courts could be expected to turn not just to the earlier English jurisprudence, but also to the modern jurisprudence in countries in related common law legal systems, including the US and Canada. In this context, the recent decision of the US Supreme Court in *Impression Products, Inc v Lexmark International, Inc* 581 U.S. (2017) is noteworthy for its introduction of an exhaustion doctrine of international scope.

However, in the event the UK left the EU but continued to participate in the (expected) Unified Patents Court (UPC; discussed further below), regional exhaustion could be expected to continue to apply in respect of patents.

Customs

In keeping with the principle of free movement of goods within the single market, the EU's customs regime (in particular Regulation 608/2013) enables customs authorities in the UK (and in other EU member states) to detain, seize and destroy goods suspected of infringing an IP right in a limited number of situations. The situations, very basically, concern goods at their point of entry into or exit from the customs territory of the union.

Equivalent national legislation currently does not exist, but in the event Regulation 608/2013 ceased to apply to the UK (upon Brexit or following expiry of any agreed transition period), national legislation is expected to preserve the ability of owners of UK intellectual property to register applications for action, and of UK customs authorities to intervene where there is suspected infringement of an intellectual property right.

Further, in the event Regulation 608/2013 ceased to apply to the UK, it should be noted in respect of intellectual property rights that any EU customs registration obtained by filing the application with the UK authority could cease to have effect in the EU. Unless the EU legislates to amend this position, stakeholders holding such EU registrations would be well advised to consider making new applications for EU wide customs registration, in one of the remaining EU27 countries.

Competition law

The UK's national laws prohibiting anti-competitive arrangements and abuses of dominance are enacted under Chapters I and II of the Competition Act 1998 (CA 98), and respectively modelled on Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU) (save that the prohibitions under the CA 98 apply to conduct that may affect trade within the UK). However, equivalent national legislation currently does not exist for the various EU block exemption Regulations. There is a need for the UK to consider replacement of the Regulations; preservation of the regime as part of the *acquis* may be the most appropriate path, and the least disruptive approach for rights owners and licensees alike.

Even if the UK leaves the EU's antitrust regime (upon Brexit or the expiry of any agreed transition period), UK undertakings and undertakings operating in the UK will remain subject to the application of Articles 101 and 102 TFEU where their activities are either (i) implemented in the EU⁸ or (ii) capable of having a substantial, immediate and foreseeable effect in the EU⁹.

In the context of patent litigation, particularly in respect of standardised technologies, the inability of a court in the UK to make references to the CJEU may present opportunities for some parties seeking resolution of multinational disputes in the courts of the UK, although it might also deter others from using the UK courts. That said, to an extent, the opportunities presented may be superseded by the introduction of the Unified Patent Court (UPC; discussed further below).

Jurisdiction

As between the courts of different EU member states, issues of jurisdiction are governed by the Recast Brussels Regulation 1215/2012 (as amended). Outside the EU (and following expiry of any agreed transition period), the Recast Brussels Regulation would cease to apply to the UK, or to any remaining EU country in respect of an issue of jurisdiction between its own courts and a court of the UK.

(According to the terms of the "partial agreement" published in March and June 2018, however, upon the expiry of any agreed transition period, the EU regimes governing jurisdiction and recognition and enforcement of judgments would continue to apply in respect of legal proceedings instituted before the end of the transition period).

Absent an agreement following the transitional period, would any earlier jurisdictional arrangement apply instead?

The Lugano Convention of 2007 was signed by the EU but not by the UK directly. Following Brexit, the 2007 Lugano Convention, therefore, would not apply unless the UK acceded to it (which would require agreement with the EU and the other signatory states).

The earlier Lugano Convention of 1988 and the Brussels Convention of 1968 were both signed by the UK, in its capacity as a member of, or as a state acceding to, the (now named) EU. Each of these agreements is, therefore, a "mixed agreement"; for example, the UK's submission to the jurisdiction of the CJEU on the interpretation of each convention is integral to the agreement; but the CJEU's power to accept references from the courts of the UK derives from Article 267 of the TFEU, which, absent agreement with the EU, would cease to apply to the UK. Accordingly, it is likely that neither of these earlier conventions would apply following Brexit (or the expiry of any agreed transition period).

Without a replacement for the Recast Brussels Regulation being agreed between the UK and the EU, the courts of the UK would apply the common law where issues of jurisdiction arose regarding the courts of the UK on the one hand and the courts of any EEA country (including

⁸ See Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others v Commission* ECLI:EU:C:1993:120.

⁹ See, Case T-286/09 *Intel Corporation v Commission* ECLI:EU:T:2014:547, paragraph 244.

any EU country) on the other. This is what happens, for example, where issues of jurisdiction arise in the UK with respect to a court of the US. The courts of the remaining EU and EEA countries would likewise apply their own national laws.

The Recast Brussels Regulation sets the jurisdictional regime applying to and between EU member states well beyond the intellectual property sphere. Replacement of it would be the sensible course irrespective of the shape of the UK's post-Brexit relationship with the EU. The successful resolution of this issue underpins the solutions available for a constructive relationship between the UK and the EU following Brexit in many areas of the law, including in respect of the Unified Patent Court (on which please see below).

In the authors' view, the replacement of the Recast Brussels Regulation regime should be considered a practical matter of priority, in the interests of smoothing the impact of Brexit for all citizens and businesses in the EU; the area is inappropriate for use as a bargaining tool by either party to the Article 50 negotiations. A replacement convention would be a sensible course, an obvious solution being for the UK to accede to the Lugano Convention of 2007 (amended as necessary to give effect to any agreement reached in respect of the UPC system).

The impact of Brexit for patents

The current system

At present, and in basic terms, there are two systems pursuant to which a patent may be granted covering the UK: the national system, in which an application is made to the UK Intellectual Property Office (UK IPO); and the European system, pursuant to which an application is made to the European Patent Office (EPO). (Either system may be preceded by, or may provide the receiving office for, an application under the international system).

Both systems are largely outside the remit of EU law, although there are some exceptions, most notably, the Biotechnology Directive (no. 98/44) and the IP Enforcement Directive (no. 2004/48). In respect of each directive, necessary implementation into national law has already taken place, so a legislative gap in respect of their provisions would not emerge upon Brexit.

Aside from the EPO's remit to hear post-grant oppositions filed within the first nine months of grant, and centralised applications by the proprietor for amendment or revocation, questions of infringement and validity of each national designation are, in basic terms, at present a matter for the courts of each relevant country. For patents covering the UK (both national patents and UK designations of European patents), such issues are, therefore, a matter for the courts of the UK.

Consequently, Brexit is unlikely to entail significant upheaval for the existing patent system; but the consequences for the proposed Unified Patent Court and unitary patent system are potentially very significant.

The UPC and UP system

The existing patent system is expected to undergo notable changes, as a result of the Agreement on a Unified Patent Court (**UPC Agreement**), which has now been ratified by the UK. Subsequently, the new system will come into force when ratification is completed by Germany. This could occur before the UK exits the EU but is now seen as more likely to occur after Brexit (but within the term of any agreed transition period), as a result of delays caused by a constitutional challenge in Germany.

The UPC Agreement is an international agreement that has been signed by the vast majority of EU member states, including the UK. It establishes a new court, the 'Unified Patent Court' (UPC) for the settlement of disputes relating to i) "European patents" and ii) "European patents with unitary effect". (The system for grant of, and dispute resolution in respect of, national patents is not impacted by the new system).

"European patents" are those granted by the EPO pursuant to the European system referred to above. Granted European patents are essentially a bundle of national designations.

Pursuant to the UPC Agreement, all disputes regarding such patents become a matter for the UPC instead of national courts, unless the proprietor of the relevant patent has, during the transitional period, "opted out" the patent from the exclusive competence of the UPC.

"European patents with unitary effect" will be, essentially, a new designation of European patent which will be made available by the UPC Agreement and supporting EU legislation. Commonly referred to as 'Unitary Patents' (UPs), they will be available for an applicant to request within one month of grant of a European patent. Where a UP designation is requested, it will be granted instead of a national designation for all states which have, at the time of grant of the patent, signed and ratified the UPC Agreement (and joined the UP part of the system). In contrast to classical European patents, where the relevant national law applies to each designation in certain contexts (such as licensing and assignment), a UP will be a unitary right governed by one law. The law to be applied would be determined by the residence, principal place of business or place of business of the applicant(s); failing any of these in a participating Member State then German law would apply. UPs could not be opted out of the exclusive competence of the UPC.

Brexit (at least following the expiry of any agreed transition period) presents a number of uncertainties for the new system and the UK's participation in it after exiting the EU:

(i) The legality of the UPC system with post-Brexit UK included

First, there is uncertainty regarding the compliance of the UPC Agreement (and, therefore, the court) with EU constitutional law if the UK remains within the system following Brexit. The most notable issue in this respect concerns Article 267 of the TFEU. Article 267 establishes the jurisdiction of the CJEU to receive references from "any court or tribunal of a Member State"; this is consistent with the provisions of Article 71a of the Recast Brussels Regulation (as amended) which says that: "a court common to several Member States... shall be deemed to be a court of a Member State". Following Brexit, there is uncertainty as to whether the UPC (including the UK) would still be a court or tribunal of a Member State. It may be that agreement is needed between the UK and the EU in order to clarify the legal position, and that complementary adjustments would need to be made to framework agreements.

It is perhaps noteworthy that this was the principal issue identified by English barristers Richard Gordon QC and Tom Pascoe in their opinion, issued in September 2016, considering whether the UK could remain involved in the UPC and UP system following Brexit.

It may also be necessary for arrangements to be made to safeguard the continuing operation in the law of the UK, to the extent necessary for compliance with the UPC Agreement, of a number of EU Treaty obligations, in particular, Article 4(3) TEU, Articles 258, 259 and 260 TFEU, The Charter of Fundamental Rights and, potentially, TFEU Articles 101 and 102.

(ii) The legality of the UK remaining within the UPC following Brexit

Second, the jurisdiction and operation of the UPC is dependent upon the existence in the national law of the Contracting Member States (to the UPC Agreement) of the Recast Brussels Regulation (as amended by Regulation 542/2014). Despite reference to the Lugano Convention of 2007 in the UPC Agreement, accession by the UK to Lugano would not be sufficient to compensate for the Recast Brussels Regulation ceasing to apply. At the very least, the Lugano Convention would need amendment, as Regulation 1215/2012 was amended by Regulation 542/14, to give effect to the UPC Agreement; the UPC Agreement would also need complementary amendment.

Similarly, EU Regulations 593/2008 & 864/2007, on contractual and non-contractual liability respectively form part of the EU legal framework in which the UPC Agreement sits.

For the UK to remain within the Unitary Patent system, Regulations 1257/2012 (on the creation of the unitary patent) and 1260/2012 (on the language regime regarding the unitary patent) would also need to continue to apply.

All of this legislation is reciprocal in nature; following the UK's exit from the EU, it would not remain in force as between the UK and the other member states of the EU, or as between the UK and the other Contracting Member States of the UPC Agreement, unless agreement was reached with those other states.

Third, to the extent necessary for continuing compliance with the terms of the UPC Agreement, the UK would need, potentially, to ensure the continuing operation in UK law of SPC Regulations 469/2009 and 1610/96, (which interact also with Regulations 1901/2006, 141/2000 and 726/2004 and Directives 2001/83 and 2001/82), the limitations on the effects of a patent contained in Regulation 2100/94 and Directives 2001/83, 2001/82, 2009/24, 98/44), and the IP Enforcement Directive 2004/48.

Fourth, the UPC Agreement would need adjustment, in particular: to change the definition of "Member State" and/or "Contracting Member State" so that it no longer required a contracting party to the UPC Agreement to be a member state of the European Union; and to ensure that lawyers authorised to practice before a UK court remained authorised to represent parties in the UPC.

(iii) Providing certainty regarding the UPC and UPC system

In practice, if Germany completes ratification of the UPC Agreement in order to get the new system up and running before Brexit, its commencement will entail a considerable degree of uncertainty regarding the impact of Brexit. The draft partial agreement published by the EU and the UK in March 2018 indicates that, if a transition period is agreed, it will facilitate the UK's continued involvement in the new system for the term of the transition period, although there would remain some uncertainties.

Without the resolution of the legal difficulties noted above, challenge to the jurisdiction of the new court and/or the enforceability of a judgment could be expected, resulting in a reference to the CJEU and a ruling in respect of the legality, as a matter of EU law, of the court and/or the UK's involvement within it.

There would seem to be a risk of the CJEU ruling that, with the UK within the UPC system, the court, as presently constituted, was not compliant with EU law.

That said, the risks would be reduced considerably if the potential legal issues were addressed and appropriate steps taken to resolve them. These may include, to the extent necessary for the UPC Agreement, the following: agreement between the UK and the EU to resolve the Article 267 question; agreement between the UK and the EU (and potentially the EEA) to resolve the Recast Brussels Regulation issue and/or for the UK to accede to the Lugano Convention 2007 (amended to accommodate the UPC Agreement); agreement between the UK and the EU with respect to the other legislation of a reciprocal nature noted above, and potentially all EU legislation relevant to any dispute before the UPC; and agreement with the other Contracting Member States of the UPC Agreement to adapt the UPC Agreement accordingly (including with respect to the definition of Contracting Member State).

(iv) Timetable for the introduction of the UPC and UP system

The UK completed ratification of the UPC Agreement on 26 April 2018.

The UK Government, however, has given no indication of how it plans to address the issues identified in sub-sections (i) to (iii) above, in view of its stated intent to repeal the European Communities Act. This state of affairs gives rise to considerable uncertainty for all stakeholders.

In addition, it is noteworthy that the UPC Agreement will only come into force once it has been ratified by Germany (as well as the UK). For now, the German Constitutional Court has put a brake on German ratification while issues of German constitutional law are considered by the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*). The authors find it interesting that constitutional issues potentially involving some elements of similarity were

raised in litigation in the UK, in *Virgin v Jet*¹⁰, but rejected by the Court of Appeal of England and Wales.

The impact of Brexit for SPCs

A supplementary protection certificate (SPC) is a form of intellectual property that extends patent term in respect of pharmaceutical or plant protection products in qualifying circumstances. The maximum duration of an SPC is five years, which is intended to compensate, to some degree, for the period elapsing between the filing of an application for a patent for a new medicinal or plant protection product and the grant of authorisation to place the medicinal product or plant protection product on the market.

For EU member states, including the UK, SPCs are granted at the national level by the relevant patent office (for the UK, the UK IPO) pursuant to the relevant EU Regulation(s) and national implementing legislation.

The terms of the draft “partial agreement” published by the EU and the UK in March 2018 indicate that, for the term of any agreed transitional period, the UK would remain within the SPC system. The system would also continue to apply after the end of the transition period in respect of any application filed before that time.

Upon Brexit or expiry of any agreed transitional period, the relevant UK national legislation (i.e. the Patents Act) will remain in place, so SPCs which have already been granted by the UK IPO by the date of the UK’s exit from the EU are not expected to be impacted (beyond the changes associated with the UPC Agreement). The proposed preservation of the *acquis* would keep the system in place in the UK upon Brexit.

The SPC regime would be ripe for broader review in the context of Brexit or shortly thereafter. This is because the key EU Regulations upon which it is based, 469/2009, 1901/2006, 141/2000 (medicinal products) and 1610/96 (plant protection products), interact with other EU legislation. The interaction means that preservation of the *acquis* in this area is not straightforward. Holistic consideration should be given to the operation of the SPC regime in the UK following Brexit, in harmony with review of healthcare regulatory law and in light of referenced EU legislation.

The European Patent Convention, Article 63, for example, permits a contracting state (of which the UK is one) to extend the term of a European patent by the time of duration of the relevant administrative authorisation procedure. Should the UK lift the cap of five years on the term of extension of the life of the patent? Or increase the scope of the regime to include medical devices? Or consider moving to a patent term extension regime more akin to that in the US and Japan? Or tweak the regime to incentivise early clinical trial approval in the UK?

Outside the jurisdiction of the CJEU, SPC law is also an area in which Brexit would enable the UK courts to provide greater clarity in the jurisprudence. Indications that judges in the UK have not been comfortable with the SPC legislation and the CJEU’s interpretation of it are apparent in the English jurisprudence, for example:

Arnold J in *Teva v Gilead*, [2017] EWHC 13 (Pat), referring to the CJEU’s judgment in *Actavis v Sanofi*, C-443/12:

... the Court of Justice has once again failed to give national authorities clear guidance as to the proper interpretation of Article 3(a). ... All that can be said with confidence is that, once again, the Court appears to be suggesting that something more is required than the product falls within the scope of the basic patent applying the Extent of Protection Rules, but without making it clear what more.

Floyd LJ in *Sandoz v Searle* [2018] EWCA Civ 49 (on Article 3(a) of Regulation 469/2009):

¹⁰ [2013] EWCA Civ 1713

Like the judge...I am concerned with what I see as a fundamental defect with the "identification" test. The CJEU jurisprudence to date seems to take it as read that a claim can identify active ingredients with specificity. However that is not the function of claims in patents. Instead, claims are concerned with setting the limits to the monopoly ... I agree with the judge that a far better test would be to ask whether the product the subject of the SPC embodies the core inventive advance of the basic patent.

The conceptual gulf between the English courts and the CJEU is also apparent in the CJEU jurisprudence also; for example, in the *Teva v Gilead* case, AG Wathelet said:

... it is clear from the Court's case-law, in particular ... *Medeva* ..., ... *Eli Lilly* ..., *Actavis*..., that the only means of determining whether a basic patent protects an active ingredient within the meaning of Article 3(a) of Regulation No 469/2009 is to be found only in the wording, or interpretation of the wording, of the claims of the patent granted, and nowhere else.

The impact of Brexit for trade marks

The tort of passing off may protect goodwill attached to goods or services in the UK, in the event of misrepresentation leading to or likely to lead the public to believe that the goods or services offered are the goods or services of the claimant, or there is some other authorised link, and the claimant suffers damage as a result¹¹. The law of passing off is outside the remit of EU law. It is cause of action, operating as a sort of unregistered right which is confined to UK activity, and so will not be impacted by Brexit.

At present, there are two systems pursuant to which a registered trade mark may be granted covering the UK: the UK national system, under which an application is made to the UK IPO; and the EU system, under which an application is made to the EU Intellectual Property Office (EUIPO). Either type of registration may alternatively be sought by designating the UK or EU in an international registration under the Madrid system.

The national registered system

The UK national registered trade mark system is governed by the Trade Marks Act 1994 (as amended) - which is framed so as to comply with harmonising EU-wide legislation, in particular Directive 2008/95. Being governed by UK legislation, the impact of Brexit upon the UK national system will be relatively minimal; the most significant change is likely to concern the number of filings made in the UK system in the future.

In the medium term, if the UK is outside the EU, there is potential for some legislative divergence between the UK trade mark system and the EU system although, in the context of the widespread international alignment of trade mark systems, this is expected to be minimal. Although much CJEU jurisprudence is also likely to remain persuasive, trade mark law is an area in which the courts in the UK have, at times, struggled to reconcile the guidance of the CJEU with the terms of the relevant legislation, as exemplified by the judgments of Arnold J in *Nestlé v Cadbury* [2016] EWHC 50 (Ch), *Supreme Petfoods v Henry Bell & Co* [2015] EWHC 256 (Ch) and *Sky v Skykick* [2018] EWHC 155 (Ch).

There is, therefore, scope for the UK national system to steer a different course on some issues, once it is no longer subject to EU harmonising legislation and the CJEU.

The EU registered system

The EU trade mark system is governed by EU Regulation 2017/2001 and predecessor legislation. An EU trade mark (EUTM) is a unitary right covering the EU. It may be enforced or challenged for the whole of the EU in a single court action.

¹¹ *Reckitt & Colman Products v. Borden* [1990] UKHL 12; *Starbucks v. British Sky Broadcasting* [2015] UKSC 31

The terms of the draft “partial agreement” published by the EU and the UK in March 2018 indicate that for the term of any agreed transitional period the UK would remain within the EUTM system. At the end of the transition period the owner of an EUTM would, pursuant to UK law, become the owner of an equivalent national right covering the UK without any re-examination. Thereafter, the first renewal date in the UK in respect of the UK daughter trade mark would be that of the corresponding EU parent trade mark. A UK daughter trade mark would enjoy the date of filing or priority (or, where appropriate, seniority) of its EU parent trade mark. Owners of applications for EUTMs pending at the end of the transition period would have nine months in which to file a UK application for the same trade mark, in respect of identical goods and services, with the benefit of the same filing, priority and seniority date as the equivalent EU application. A UK daughter trade mark would not be liable to revocation on the ground that the corresponding EU trade mark had not been put into genuine use in the UK before the end of the transition period.

The owner of an EUTM with a ‘reputation’ in the EU at the end of the transition period would be entitled to rely on that reputation in the UK, but thereafter the reputation of the UK daughter trade mark would be based on use in the UK. The administrative arrangements for the transitioning of such EU rights into UK rights have not been agreed.

It will not be possible for the UK unilaterally to preserve its participation in the EUTM system upon Brexit (or the expiry of any agreed transition period). At that point, without a negotiated arrangement, the EUTM system will cease to include the UK. The UK can, however, enact national legislation to minimise the disruption caused in such a scenario and to protect UK rights registered or applied for through the EU system, and the UK government has indicated that this is its intent¹². National legislation could potentially provide this by a variety of mechanisms¹³. Brexit poses questions for European trade mark law also; for example, an EUTM may be revoked if it has not been put to genuine use in the EU within five years of registration. An EUTM for which use is mostly concentrated in the UK may be at additional risk of revocation following Brexit by a court in a remaining EU state, unless transitional arrangements are put in place by the EU. The draft partial agreement makes no provision for the EU to recognise, following the expiry of the transition period, genuine use or reputation of an EUTM which is founded on such use in the UK. The issue of acquired distinctiveness, where an objection on absolute grounds is raised against an EUTM, could potentially render the EUTMs of UK-focused businesses more vulnerable, too. However, CJEU (General Court) case law requiring that the establishment of acquired distinctiveness in the English language be demonstrated across many EU countries means that, in practice, Brexit may have minimal impact in this respect¹⁴.

What brand owners can do now

In the meantime, what brand owners can do is to file UK national trade marks now, in parallel with EUTM protection. The UK national trade marks regime will not be impacted by Brexit. This may provide duplicate protection in due course (if a deal is done for the UK to remain within the EUTM system or because UK national legislation enables a UK right to be extracted from an EUTM). However, having a newer UK registration may be useful since there are no proof of use requirements in the first five years of a UK registration.

¹² IP and Brexit: The facts, 23 July 2018: https://www.gov.uk/government/news/ip-and-brexit-the-facts?utm_source=ff6cbc94-a1dd-4a24-a825-e226a088555b&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

¹³ The legal consequences of Brexit through the lens of IP law, R. Arnold, L. Bentley, E. Derclaye & G. Dinwoodie, *Judicature*

¹⁴ *Bach Flower Remedies Ltd v EUIPO*, T 337/15, 29 September 2016

The impact of Brexit for designs

There are four systems pursuant to which a design may be protected in the UK: the national registered and unregistered systems; and the EU registered and unregistered systems.

National designs systems

Under the UK national registration system, an application for a registered design covering the UK may be made to the UK IPO. A registered design has a term of 25 years from filing, provided renewal fees are paid. It protects the appearance of the whole or part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product or its ornamentation. Registration, and any subsequent questions of infringement and validity, are governed by the UK Registered Designs Act 1949 and associated legislation (which has been amended in order to comply with harmonising EU-wide legislation, in particular Directive 98/71). Although it has factored in various harmonising changes over the years, as this is self-standing national law the impact of Brexit on the UK registered designs system is expected to be minimal, with the most significant impact likely to concern the number of filings made in the UK system in the future.

Pursuant to the Copyright Designs and Patents Act 1988 (CDPA), an unregistered design right (UDR) covering the UK arises automatically in qualifying circumstances. It protects the shape or configuration of the whole or part of an article and lasts for (the shorter of) ten years from first sale or 15 years from first creation (dates calculated from the end of the relevant calendar year). In either case, the final five years of protection are subject to licence of right requirements. Questions of subsistence and infringement are also governed by the CDPA. Upon Brexit, no legislative gap will emerge in respect of UK national UDR.

That said, upon Brexit, policy questions arise in respect of UK national UDR. In particular, should UK national UDR continue to be available to those who have habitual residence or establishment in the EU (rather than just the UK), or by reference to first marketing in the EU (rather than just the UK)?

In the authors' view, in the absence of a legislative gap, the UK should not be too hasty to amend the existing national provisions. Adapting the national system to exclude EU residents and designs first marketed in the EU from UDR protection would be a bold, and not necessarily wise, negotiating strategy because it would be in the interests of the British design industry for the UK to reach a mutually beneficial arrangement with the EU regarding the EU unregistered design system.

Questions also arise as to whether the national unregistered system should be adapted so as to replace any aspects of the Community unregistered design right system (such as protection for surface decoration) lost as a consequence of Brexit (more on which please see below).

EU designs system

EU Regulation 6/2002 and Implementing Regulation 2245/2002 together establish unitary EU-wide regimes for registered and unregistered design protection; the rights arising may be enforced or challenged for the whole of the EU in a single court action (depending on where the defendant is based). Like the UK registered design system (which is framed in accordance with EU-wide harmonising legislation), the Community regimes protect the appearance of the whole or part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product or its ornamentation. A Community registered design has a term of 25 years, provided renewal fees are paid, whereas the unregistered Community design right lasts for three years from the point the design is first disclosed or made available to the public in some manner.

According to the terms of the draft "partial agreement" published by the EU and the UK in March 2018, for the term of any agreed transitional period the UK would remain within the EU designs system. At the end of the transition period an owner of an EU registered design would, pursuant to UK law, become the owner of an equivalent national design right covering the UK without any re-examination, although the administrative arrangements for the transitioning of such EU rights into UK rights have not been agreed. The UK would continue

to recognise unregistered Community design rights and *sui generis* database rights arising before the end of the transition period.

Upon Brexit (or the expiry of any agreed transition period), it will not be possible for the UK to preserve its participation in the EU designs system unilaterally. Without a negotiated arrangement, both the registered and unregistered Community systems will cease to cover the UK, and this is currently seen as the likely outcome. UK owners of Community designs that exist before Brexit will still be able to enforce them in the remainder of the EU. As regards the UK, the disruption caused by such a scenario can be mitigated to an extent by UK national legislation and the UK government has indicated that this is its intent¹⁵. However, the legal positions, and therefore the options for the UK, differ between the two Community design regimes.

As with EUTMs, transitional and replacement UK legislation would be needed in respect of Community registered designs, to ensure that Community registered designs (and applications) existing at the date of Brexit continue to be recognised by the UK courts as covering the UK and/or to transition such rights into the national registered designs regime. The approach adopted is likely to follow that adopted for trade marks, although depending on which approach is taken for trade marks, some adjustments may be needed for designs.

The position for unregistered Community design right is a little more complex.

First, UK and Community unregistered design rights protect different aspects of a design (the UK right covers only shape and configuration, whereas the Community right covers surface decoration, materials, textures, colours and so on), and they have different durations (UK is 10-15 years, Community is three). Some see the EU right as *narrower* than that of the UK, as differences of surface decoration could be sufficient to avoid infringement under the EU regime; nevertheless the EU regime enables protection for surface decoration whereas UK UDR does not. It is expected that in the context of the EU (Withdrawal) Bill and associated secondary legislation, the UK will provide for the creation of a further type of UK unregistered design right protection reflecting the scope of protection available under the EU regime.

Secondly, subsistence of unregistered design right is dependent upon qualification criteria being met. As noted above, the UK may unilaterally continue to enable qualification for the UK national right to be met by habitual residence or establishment in the EU or first marketing in the EU; but the reciprocal arrangement, of unregistered Community design right continuing to subsist by reference to first marketing in the UK, would only occur pursuant to amendment to the EU legislation governing the EU designs regime, which is unlikely unless specific agreement on the point is reached between the UK and the EU.

Since the geographical scope of the EU unregistered right is broader than that of the UK right, Brexit raises challenges for UK-based designers. Should they ensure their designs are first made available to the public in the EU rather than the UK? Or should they go to the expense of registering a Community right? Businesses that rely on unregistered design rights should consider this as a matter of priority, and given the relatively low cost of registration compared to patents, it is worth considering registration carefully. It is important to bear in mind that designs cannot be registered more than one year after they were first disclosed, so if a business normally relies on Community unregistered design right, which may fall away as soon as March 2019, now is the time to register those designs.

What designers can do now

In the meantime, when seeking to register a new design, designers can apply for a UK registered design in parallel with any application for a Community registered design. The UK registered design regime will not be impacted by Brexit. A new UK design registration would

¹⁵ IP and Brexit: The facts, 23 July 2018: https://www.gov.uk/government/news/ip-and-brexit-the-facts?utm_source=ff6cbc94-a1dd-4a24-a825-e226a088555b&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

not be valid if it is for a design disclosed more than 12 months previously; however, where the Community design registration is less than one year old, a UK application can be filed taking priority from the Community registration. This may end up providing duplicate protection, but it also avoids the risk (albeit this is seen as unlikely) of no registered design protection existing in the UK.

Designers that currently rely on Community unregistered design right to protect surface decoration can file an application for a UK registered design for any designs disclosed in the past year, and by this mechanism secure ongoing protection in the UK for the same aspects of a design as are protected under the Community unregistered design right.

The impact of Brexit for copyright and neighbouring rights

Copyright and related rights are governed in the UK by the CDPA, which has been framed so as to give effect to the terms of international treaties, for example the Berne Convention of 1886. Provided a work qualifies by its author's nationality or domicile or by the place of first publication, protection arises automatically upon recordal in writing or some other form, and may subsist in original works in any of the protected categories: literary, dramatic, musical and artistic works, sound recordings, films, broadcasts and typographical arrangements of published editions.

Databases can be protected by copyright, or by a *sui generis* 'sweat of the brow' database right. As with the above forms of copyright, subsistence and infringement are governed by the CDPA.

At present, there is no unitary copyright protection in the EU. However, the EU has legislated, in multiple different Directives and Regulations¹⁶, so as to harmonise aspects of the law relating to copyright. National legislation has been updated accordingly. The UK courts' interpretation of aspects of national legislation has similarly evolved to reflect CJEU rulings in respect of European legislation.

Until recently the EU legislation in this area has been limited to Directives which have been implemented into national law; this legislative structure will remain intact upon Brexit. However, in similarity with the position for UDR, Brexit raises policy questions for the UK. This is because in certain contexts, the protection conferred is dependent upon whether the author or country of first publication is an EEA country or another Berne Convention country. Should the UK unilaterally continue to confer preferential treatment in respect of the EEA? Some relatively minor adjustment to the national legislation may also be appropriate, for example in respect of the existing EU orphan works regime.

Following Brexit (or the expiry of any agreed transition period), if no agreement is reached pursuant to which UK copyright law must remain aligned with that of the EU, the UK will be free to overhaul the copyright regime (within the constraints of its international treaty obligations) and to choose to keep or discard aspects of the law derived from EU legislation. One area of interest in such a scenario is whether the courts in the UK would revert to former interpretations of legislative provisions that pre-date EU legislation; for example, the interpretation of 'original' in copyright law has been steered, pursuant to CJEU guidance, to the European concept of the author's own intellectual creation, rather than the former 'skill, labour and judgment' standard of English law - it may take some time for the correct post-Brexit approach to be settled.

¹⁶ Satellite and Cable Directive 93/83, Database Directive 96/9, InfoSoc Directive 2001/29, Directive 2001/84 on resale right, Intellectual Property Enforcement Directive 2004/48, Directive 2006/115 on rental and lending rights, Software Directive 2009/24, Term Directive 2011/77, Orphan Works Directive 2012/28, CRM Directive 2014/26, Directive implementing the Marrakech Treaty in the EU 2017/1564, Regulation implementing the Marrakech Treaty in the EU 2017/1563, Portability Regulation 2017/1128. In addition the E-commerce Directive 2000/31 and the Conditional Access Directive 98/84 impact copyright law to an extent.

In the area of copyright and neighbouring rights, without a broad negotiated arrangement applying to this area of the law, Brexit is likely to lead to divergence in the legislative regime governing the law in the UK as compared with that in the remaining EU. This is because the EU is progressing the development of its regulation of copyright law. Without the UK to negotiate with, EU regulation is likely to more rigorously harmonise certain concepts and areas considered important in some continental European legal systems, for example in respect of moral rights and author-publisher contracts.

The impact of Brexit for other intellectual property rights

The impact of Brexit for quality schemes for agricultural and food products

EU Regulation 1151/2012 on quality schemes for regulation of agricultural and food products governs unitary regimes for the application for and award of protected 'designations of origin', 'geographical indications' and 'traditional specialities guaranteed'. Under the systems, a named food or drink registered at the European level is given legal protection against imitation throughout the EU.

In accordance with the draft "partial agreement" published by the EU and the UK in March 2018, for the term of any agreed transitional period the UK would remain within the EU's quality schemes for agricultural and food products. Agreement has not been indicated regarding arrangements in respect of the schemes upon expiry of the transition period. At present, UK law does not provide for national rights of this nature, so without a negotiated arrangement (and national legislation), the EU schemes will cease to apply in the UK and no equivalent national rights will be available.

The regulation of wines and spirits is outside the remit of intellectual property law as it is usually understood and is beyond the scope of this paper.

The impact of Brexit for plant variety rights

EU Regulation 2100/94 governs a unitary regime for the grant of a 'Community plant variety right', available for new, distinct, uniform and stable plant varieties. Pursuant to this system, protection is available from the Community Plant Variety Rights Office.

In accordance with the draft "partial agreement" published by the EU and the UK in March 2018, for the term of any agreed transition period, the UK would remain within the Community plant variety right regime. At the end of the transition period, the owner of a Community plant variety right would, pursuant to UK law, become the owner of an equivalent national right covering the UK without any re-examination. Administrative arrangements have not been agreed.

It will not be possible for the UK unilaterally to preserve its participation in the Community plant variety right system upon Brexit (or the expiry of any agreed transition period). At that point, without a negotiated arrangement, the system will cease to include the UK. The UK can, however, enact national legislation to minimise the disruption caused in such a scenario and to protect UK rights registered or applied for through the EU system.

The UK's national plant variety right system is governed by national legislation (framed in the context of international convention). Pursuant to the UK system, protection is available from the UK Plant Variety Rights Office. The system will remain in place upon Brexit.

The impact of Brexit for confidential information and trade secrets

The English law against misuse of confidential information has evolved in the tradition of the common law. This, rather than legislation, has long been considered to be compliant with the country's obligations under the TRIPS Agreement with respect to "undisclosed information". The tort of breach of confidence protects information which has the "necessary quality of confidence", is communicated in circumstances importing an obligation of confidence, and is used (or threatened to be used) in an unauthorised way to the detriment of the owner (*Coco v A. N. Clark* [1969] RPC 41, *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109).

On 9 June 2018, the UK Trade Secrets (Enforcement etc.) Regulations 2018 came into force, to give effect to the EU Trade Secrets Directive, which broadly harmonises the law in this area in the EU. The Directive requires EU member states to provide protection for trade secrets, which are defined (broadly) as information which (a) is secret, in the sense that it is not generally known or accessible in the circles that normally deal with the kind of information in question, (b) has commercial value because it is secret, and (c) has been subject to reasonable steps to keep it secret. In practice, the new legislation is not expected to lead to a significant change to the legal protection available for trade secrets in the UK.

It is generally considered unlikely that, in practice, the Directive will result in substantial changes to the headline legal protection for trade secrets. Nevertheless, adjustments have been made to the applicable principles of law.

Pursuant to the draft “partial agreement” published by the EU and the UK in March 2018, for the term of any agreed transition period, the UK’s law in this area would continue to develop with any emerging jurisprudence from the CJEU on the interpretation of the Trade Secrets Directive. Upon expiry of the transition period (or Brexit, if a transition period is not agreed) no legislative gap would emerge, but it may take time for the jurisprudence to settle any areas of strain between the UK and EU-derived principles.

The impact of Brexit for enforcement

Across intellectual property law, the Intellectual Property Enforcement Directive 2004/48 (IPED) sets minimum standards for remedies in respect of the enforcement of intellectual property rights. National legislation was amended to implement the IPED to the extent considered necessary at the time, and principles of the IPED, for example of proportionality in the award of any injunctive relief, have become progressively more important in the analysis of applications for relief from the UK courts in intellectual property disputes. Pursuant to the draft “partial agreement” published by the EU and the UK in March 2018, this would continue for the term of the transition period.

Upon the expiry of the transition period (or Brexit, if a transition period is not agreed), the expectation is that the *acquis* existing at the date of Brexit/transition expiry would continue to be applied by the courts in the UK, although the Supreme Court would be able to depart from it.

The impact of expected Brexit on new EU legislation entering into force before the UK exits the EU

As the European Council stated in its guidelines for Brexit negotiations, until the UK leaves the Union, it remains a full member, subject to all rights and obligations set out in the EU Treaties and under EU law, including the principle of sincere co-operation. In accordance with this, the UK is expected to progress the implementation into national law of EU legislation requiring national legislative provision before Brexit. In the sphere of intellectual property law, this applies, for example, in respect of trade mark law (to implement Directive 2015/2436 by 14 January 2019) and in respect of copyright law (to implement Directive 2017/1564).

It remains to be seen whether the Government will prioritise the drafting and parliamentary legislative time necessary to progress these developments, but at this time it can be expected to do so.

Priorities for article 50 negotiations and drafting of UK legislation

Establishing clarity on the framework relationship between the UK and the EU following Brexit

With a view to maintaining certainty and stability for businesses and individuals throughout the EU (both in the UK and in the remaining EU countries), it should be a priority for both the UK and the EU to establish as soon as possible, in the course of the Article 50 negotiations, whether the UK will participate in the regimes discussed or the terms of any replacement regime, namely:

- a. Free movement of goods and services (Articles 26-29 & 56-62 TFEU)
- b. Community Customs code (Regulation 608/2013)
- c. EU anti-trust law (TFEU Articles 101 & 102)
- d. Jurisdiction and enforcement in civil and commercial matters (Recast Brussels Regulation 1215/2012, or possibly Lugano 2007)

Establishing clarity on the unitary regimes for intellectual property

Once clarity has been achieved regarding the framework aspects listed above, it should be possible for the EU and the UK to reach agreement regarding, or otherwise for clarity to be established regarding, the extent to which the UK will remain within the unitary regimes for intellectual property discussed above, namely:

- e. The Unified Patent Court (Article 267 TFEU, Regulation 1215/2012/amended Lugano 2007, and potentially Articles 258, 259 and 260 TFEU, Article 4(3) TEU, The Charter of Fundamental Rights, Articles 101 and 102 TFEU, Regulations 593/2008 and 864/2007, SPC Regulations 469/2009 and 1610/96, (which interact also with Regulations 1901/2006, 141/2000 and 726/2004 and Directives 2001/83 and 2001/82), Regulation 2100/94 and Directives 2001/83, 2001/82, 2009/24, 98/44 on the limitations on the effects of a patent, and the IP Enforcement Directive 2004/48, to the extent necessary for compliance with the UPC Agreement; also amendment of the UPC Agreement would be needed).
- f. The Unitary Patent (in addition to the legislation necessary for the UK to remain within the UPC, Regulations 1257/2012 and 1260/2012).
- g. Regulation of medicinal products and medical devices (for example, Regulations 1901/2006, 242/2000, 726/2004, Directives 2001/83, 2001/82 and associated legislation).
- h. The EU trade mark system (Regulation 207/2009 & associated legislation).
- i. The Community registered and unregistered designs systems (Regulations 6/2002 and 2245/2002 and associated legislation).
- j. The quality schemes for agricultural and food products (Regulation 1151/2012).
- k. The Community plant variety rights system (Regulation 2100/94 and associated legislation).
- l. The proposed digital single market package.

Establishing clarity on the harmonising regimes for intellectual property

In parallel with the negotiations regarding the unitary regimes discussed above, it should be possible for the EU and the UK to reach agreement regarding, or otherwise for clarity to be established regarding, the extent to which the UK will remain within or bound by the EU's harmonising regimes in the following areas:

- m. Supplementary protection certificates (Regulations: 469/2009, 1610/96)
- n. Trade marks (Directives 2008/95, 2015/2436)
- o. Designs (Directive 98/71)
- p. Copyright and neighbouring rights (Directives 93/83, 96/9, 2001/29, 2001/84, 2006/115, 2009/24, 2011/77, 2012/28, 2014/26)
- q. Trade Secrets (Directive 2016/943)
- r. Enforcement (Directive 2004/48)

Preparing domestic legislation to give effect to any negotiated arrangement and/or to prevent legislative lacunas arising

If the UK will remain within any unitary and/or harmonising regime, the legislative arrangements for the UK's exit from the EU and the UK's ongoing relationship with the EU will need to facilitate this.

If the UK will exit any unitary regime when it exits the EU or the transition period ends then, as discussed above, the UK Government will need to prioritise the passing of domestic legislation to facilitate as smooth a transition into national regimes as possible. As a minimum, this should address the areas identified in this section by the numerals b., c. (block exemptions), g., h., i., and k., as discussed above (to the extent the UK will not remain within any of these regimes).

Achieving clarity in respect of the UPC and UP system should be a priority for the UK Government.

In the course of time and to the extent the UK is outside the relevant harmonising regime, the UK would also be well advised to consider whether amendments should be made to the national regimes in the areas identified in this section by the numerals e. (limitations on the effect of a patent), m., n., o., p., q., and r., to reflect policy and other national considerations arising as a consequence of Brexit and the UK's ongoing relationship with the EU.

Conclusion

For the UK Government and the Civil Service, the task of achieving an orderly Brexit is unprecedented. UK lawyers are well placed to assist the Government in preparing considered and appropriate draft legislation. Representative groups have made commendable strides to assist in this respect, and must continue the dialogue with the Government. The Government (and the UK IPO) should likewise continue to draw upon the expert resource that exists within the UK's legal sector, requesting, where appropriate, extensive advisory and drafting assistance.

The success of UK plc in the coming decades will be influenced considerably by decisions and enactments made in the next few months, and also in the following 1-4 years. Within the constraints of the wider legal framework, let us work together to make sure that the decisions and enactments in respect of intellectual property are the right ones.

Ailsa Carter, Gowling WLG (UK) LLP, 25 July 2018