



## **The Brexit clock ticks – what are the implications for intellectual property?**

### ***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 EU law.

The UK Government has indicated intent to repeal the European Communities Act 1972, which incorporates European Union law into the law of the UK, but nevertheless to preserve the existing body of EU law - the *acquis* - in the national law.

In many areas of the law, the preservation of the *acquis* will prevent a substantive change to the applicable law from occurring upon the UK's exit from the EU. However, EU law establishing 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 upon Brexit, or for a transition term following its exit, but only if appropriate agreement is reached with the EU. This article 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 the meantime, with a view to ensuring as smooth a transition as possible upon exit from the EU, the UK Parliament must make the necessary legislative enactments at the national level to preserve, to the extent possible, the existing rights and obligations of individuals and legal persons in the UK. Accordingly, this article seeks to identify the areas of intellectual property law in need of 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).

### ***Brexit means Brexit***

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

Article 50 states as follows:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. 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.**

3. 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.

4. 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 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.

5. 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 Service<sup>1</sup>, 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 withdrawing state and the EU. 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.

Comment at this time as to the shape of any agreement that may be reached in the course of Article 50 negotiations would be highly speculative.

#### *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 UK law by the following general provisions:

- Section 1, which defines the treaties which 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)
- 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

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<sup>1</sup> 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)

Independent of statute, EU law has no status in UK law<sup>2</sup>. Accordingly, repeal of the European Communities Act 1972, as proposed by the UK Government in its 2 February 2017 White Paper, by the passing of a “Great Repeal Bill”, 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.

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.

In order to prevent gaps arising in the UK’s legislative framework by a blanket repeal of directly effective legislation, replacement legislation would be needed and/or legislative provision would be necessary to convert the *acquis* into domestic law. The UK Government has stated its intent to convert the *acquis* in this way.<sup>3</sup>

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: arrangements would need to be negotiated 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. 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 trade marks, 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 CJEU.<sup>4</sup> In practice, the case law of the CJEU is likely to remain persuasive, most notably in areas where the UK does not unravel the *acquis*.<sup>5</sup> Nevertheless, in areas of the law in which the courts in the UK have struggled to reconcile the guidance of the CJEU with the terms of the relevant legislation (such as with respect to registered trade marks and supplementary protection certificates), repeal of the European Communities Act would mean that the UK courts were not bound by CJEU jurisprudence. Interesting questions also 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

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<sup>2</sup> *R (Miller & Ors) v Secretary of State for Exiting the European Union* [2017] UKSC 5

<sup>3</sup> The United Kingdom’s exit from, and new partnership with, the European Union, section 1.1

<sup>4</sup> The United Kingdom’s exit from, and new partnership with, the European Union, section 2.3

<sup>5</sup> Arnold, R., Bently, L., Derclaye, E. & Dinwoodie, G., *Judicature, The Legal Consequences of Brexit through the Lens of IP Law*, 2017

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.

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. 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 in legislation in respect of particular IP 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) by the owner of the relevant intellectual property or with his or her consent generally exhausts the proprietor's ability to enforce his or her intellectual property in those goods to prevent re-sale.<sup>6</sup>

Outside the single market (the EEA) 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 member states 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 or her consent exhausts the proprietor's ability to enforce his or her 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

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<sup>6</sup> 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

law legal systems, including the US and Canada. In this context, the recent decision of the US Supreme Court in *Impression Products v Lexmark International* 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, so in the event Regulation 608/2013 ceased to apply to the UK, national legislation would be needed to preserve the ability of customs authorities to intervene where there is suspected infringement of an intellectual property right. Such legislative provision should be considered in the context of the UK's approach to the establishment of national customs measures more generally. It need not, necessarily, mirror the intended scope of geographical exhaustion, but the approach should be considered with a view to complementing the intended approach.

### 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.

Following Brexit, even if the UK is outside the EU antitrust regime, 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 EU<sup>7</sup> (e.g. by selling into the EU) or (ii) capable of having a substantial, immediate and foreseeable effect in the EU<sup>8</sup>.

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 for, or it may deter other parties from seeking, resolution of multinational disputes in the courts of the UK. However, to an extent the opportunities presented (either way) may be superseded by the introduction of the UPC.

### 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, 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.

Would any earlier jurisdictional arrangement apply instead?

The Lugano Convention of 2007 was signed by the EU but not by the UK directly. Following

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<sup>7</sup> 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

<sup>8</sup> See, Case T-286/09 *Intel Corporation v Commission* ECLI:EU:T:2014:547, paragraph 244

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 none of these earlier conventions would apply following Brexit.

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 any EEA country (including any EU country). 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 “The impact of Brexit for patents”, 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 on 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 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.

Brexit is therefore 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 before the UK exits the EU, as a result of the Agreement on a Unified Patent Court (UPC Agreement), which will come into force (if and) when ratification is completed by both the UK and 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 the grant of, and dispute resolution in respect of, national patents is not impacted by the new system).

"European patents" are those granted by the European Patent Office 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" are, 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**', they will be available for an applicant to request within one month of the grant of a European patent. Where a UP designation is requested, it will be granted instead of national designations for all states which have, at the time of the grant of the patent, signed and ratified the UPC Agreement (and joined the UP part of the system). In contrast with classical European patents, where the relevant national law applies to each designation in certain contexts (such as licensing and assignment), a UP is a unitary right governed by one law. Which law applies is 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 will apply. UPs cannot be opted out of the exclusive competence of the UPC.

Brexit 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 and 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 unitary patent) and 1260/2012 (on the language regime regarding the unitary patent) would need to continue to apply also.

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 and 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 practise before a UK court remained authorised to represent parties in the UPC.

### **(iii) Providing certainty regarding the UPC and UPC system**

In practice, if the UK and Germany complete ratification of the UPC Agreement in order to get the new system up and running before Brexit, its commencement would entail a considerable degree of uncertainty regarding the impact of Brexit. A challenge to the jurisdiction of the 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 in.

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

However, 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 has completed most national legislative steps needed for ratification of the UPC Agreement.

On 26 June 2017, the remaining draft legislation, the draft Unified Patent Court



(Immunities and Privileges) Order 2017 and accompanying Explanatory Memorandum, were laid before Parliament. This secondary legislation is needed to give effect in national law to the Protocol on Privileges and Immunities of the UPC, of 29 June 2016, and to enable the UK to reach a position where it can ratify the UPC Agreement.

The draft Order is subject to an affirmative legislative process requiring resolutions of each House of Parliament, and which may involve committees, so the date upon which the draft Order is expected to be passed remains a matter for speculation. Equivalent legislation is required in the Scottish legislature also.

The UK is expected to reach a position where it is able to ratify the UPC Agreement in the autumn of 2017. If Germany ratifies the agreement within a similar timeframe, the period of provisional application could (if the requisite minimum of 13 participating states complete their formalities) commence by the end of 2017, with the 'sunrise' period for filing opt-out applications commencing in early 2018 and the UPC becoming fully operational in the second quarter of 2018.

However, the UK Government 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 reportedly put a brake on German ratification while issues of German constitutional law are considered. Very limited public information is currently available on the substance of the German challenge. Nevertheless, 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*<sup>9</sup>, but rejected by the Court of Appeal in England & Wales.

In the meantime, on 7 July 2017, the UK completed its requirements for the entry into force of the UPC's Protocol on Provisional Application, further confirming its intent with respect to the new court.

#### ***The impact of Brexit on 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 relevant national implementing legislation. Upon Brexit, 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 SPC regime will, however, necessitate consideration in the context of the Great Repeal Bill. The regime is based on several key EU Regulations: 469/2009, 1901/2006, 141/2000 (medicinal products); and 1610/96 (plant protection products), which interact with other EU legislation. The interaction means that preservation of the *acquis* in this area is not straightforward. A legislative gap could be plugged by providing for the continuation in force of the SPC Regulations, but in the short term, and preferably before Brexit, holistic consideration should be given to the operation of the SPC regime in the UK following Brexit. For example, should it continue to be the case that the term of an SPC be calculated by

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<sup>9</sup> [2013] EWCA Civ 1713

reference to the date of the first marketing authorisation in the EEA, if this does not include the UK? The approach should be considered in harmony with review of healthcare regulatory law and in light of referenced EU legislation.

In the medium term at least, the area is ripe for review. The European Patent Convention, Article 63, 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?

Outside the jurisdiction of the CJEU, SPC law is 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:

Arnold J in *Novartis v Medimmune* [2012] EWHC 181 (Pat):

... not only has the Court not answered the question referred, but also the guidance it has provided is not sufficiently clear to enable future disputes to be resolved.

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.

Arnold J in *Abraxis v Comptroller* [2017] EWHC 14 (Pat):

It would be more helpful to the national courts if the Court would expressly state when its earlier decisions are no longer to be regarded as authoritative, or as restricted to their own facts, rather than leaving the national courts to try to work this out for themselves.

### ***The impact of Brexit on trade marks***

#### ***The national system***

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 result.<sup>10</sup> The law of passing off is outside the remit of EU law. It is an 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 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

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<sup>10</sup> *Reckitt & Colman Products v Borden* [1990] UKHL 12; *Starbucks v British Sky Broadcasting* [2015] UKSC 31

concern the number of filings made in the UK system in the future.

There is a question though as to whether UK parliamentary time will be dedicated to updating UK legislation in order to reflect updating changes being introduced to the harmonising EU legislation before Brexit. The UK national system may not keep step with the EU legislation both pre- and post-Brexit.

Consequently, 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) and *Supreme Petfoods v Henry Bell & Co* [2015] EWHC 256 (Ch). There is therefore further scope for the UK national system to steer a different course on some issues, once it is no longer subject to the CJEU.

### *The EU system*

The EU trade mark system is governed by EU Regulation 207/2009 (as amended). 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. It will not be possible for the UK unilaterally to preserve its participation in the EUTM system. Without a negotiated arrangement, the EUTM system will cease to cover the UK upon Brexit and the UK will effectively be removed from the coverage given by an EU trade mark. 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.

National legislation can potentially provide EUTM owners with trade mark rights in the UK by a variety of mechanisms<sup>11</sup>. No legislative proposal has yet been made by the UK Government but the stakeholder consensus appears to favour a 'Montenegro' model, in which all existing EUTMs are automatically entered on to the UK register with the same scope of protection, registration date and, where applicable, priority and seniority. The UK Government should similarly be looking to protect the rights of applicants for EUTMs, where the registration remains pending upon Brexit.

Brexit also poses questions for EU trade mark law. 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, unless transitional arrangements are put in place. 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, recent 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 respect.<sup>12</sup>

### *The impact of Brexit on 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 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,

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<sup>11</sup> The legal consequences of Brexit through the lens of IP law, R. Arnold, L. Bentley, E. Derclaye & G. Dinwoodie, *Judicature*

<sup>12</sup> *Bach Flower Remedies Ltd v EUIPO*, T-337/15, 29 September 2016

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), **UK unregistered design right covering the UK (UDR)** 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 national UDR.

However, 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 (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.

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 upon Brexit, and this is currently seen as the likely outcome. However, UK owners of Community designs that exist before Brexit will still be able to enforce them in the remainder of the EU - just no longer in the UK. As regards the UK, the disruption caused by such a scenario can be mitigated to an extent by UK national legislation, but 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 rights 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 years). Some see the EU right as *narrower* than the UK one, as differences of surface decoration could be sufficient to avoid infringement under the EU regime. Nevertheless, without a negotiated arrangement, the Community design right system will cease to cover the UK upon Brexit and a right of exactly equivalent scope covering the UK will only be available if created by the passing of domestic legislation. At present this is considered unlikely to be a priority for the UK Government.

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 and, as such, if a business normally relies on Community unregistered design rights, which may fall away as soon as March 2019, now is the time to register those designs.

### ***The impact of Brexit on 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<sup>13</sup>, 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.

As the EU legislation in this area is, at present, limited to Directives which have been

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<sup>13</sup> Satellite and Cable Directive 93/83, Database Directive 96/9, InfoSoc Directive 2001/29, Directive 2001/84 on resale right, 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

implemented into national law, the 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, 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.

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 processing the development of its regulation of copyright law, including in respect of the "digital single market". 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 on other intellectual property rights*

#### *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.

Without a negotiated arrangement, the schemes of Regulation 1151/2012 will cease to cover the UK upon Brexit. No equivalent national regimes exist, so if (as will happen unless a negotiated arrangement is reached to the contrary) the EU legislation ceased to apply to the UK upon Brexit, protection of this nature covering the UK would only become available by the passing of domestic legislation establishing a UK national regime.

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.

#### *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. Again, without a negotiated arrangement, this unitary scheme will cease to cover the UK upon Brexit. Transitional and replacement legislation would be needed for existing Community plant variety rights to continue to be recognised in the UK pursuant to the national regime.

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.

#### *Confidential information*

Confidential information is broadly defined as information that has the necessary quality of

confidence and is subject to an obligation of confidence. It may include know-how and trade secrets. In the UK, the tort of breach of confidence may assist in protecting against its unauthorised use. Brexit would not impact the operation of this area of the law as it presently stands, which is entirely national in character. However, the coming into force of the EU Trade Secrets Directive 2016/943 in June 2018 had been expected to require review of the existing law and implementing legislation to the extent considered appropriate. It remains to be seen whether the UK will progress such steps.

#### *Enforcement*

Across intellectual property law (with the exception of the law regarding confidential information), 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 injunction relief, have become progressively more important in the analysis of applications for relief from the UK courts in intellectual property disputes.

If the UK leaves the single market, the UK courts would be free to revert to purely common law principles when considering applications for relief. However, it is unclear whether the courts would choose to divert the common law from the path of its existing development in this way, or whether it would make any real practical difference to the outcome of such a dispute in most cases.

#### *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 EU, it remains a full Member, subject to all the rights and obligations set out in the EU Treaties and under EU law, including the principle of sincere cooperation. 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 in respect of trade mark law (to implement Directive 2015/2436 by 14 January 2019), and in respect of trade secrets (to implement Directive 2016/943 by 9 June 2018).

It remains to be seen whether the UK 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*

##### **(i) 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 above in "The legislative context of intellectual property", namely:

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

##### **(ii) Establishing clarity on the unitary regimes for intellectual property**

Once clarity has been achieved regarding the framework aspects listed in sub-section (i) 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. EU Trade Mark system (Regulation 207/2009 and associated legislation)
- i. Community registered and unregistered designs systems (Regulations 6/2002 and 2245/2002, and associated legislation)
- j. Quality schemes for agricultural and food products (Regulation 1151/2012)
- k. Community plant variety rights system (Regulation 2100/94 and associated legislation)
- l. The proposed digital single market package

**(iii) Establishing clarity on the harmonising regimes for intellectual property**

In parallel with the negotiations regarding the unitary regimes discussed in subsection (ii) 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 and 1610/96)
- n. Trade marks (Directives 2008/95 and 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)

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

If the UK is to 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. This could, for example, be achieved by restricting the scope of the Great Repeal Bill to defined areas of the law not including those which will remain in force, or by enacting UK legislation to give effect to and enable ratification of any agreement reached with the EU (which may involve the CJEU continuing to have jurisdiction covering the UK in such matters).

If the UK is to exit any unitary regime when it exits the EU, 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, following Brexit, remain within any of these regimes).

What will be required in respect of the proposed UPC and UP system will depend upon its status at the date of the UK's exit from the EU and any agreement(s) reached in respect of the system and the UK's ongoing participation (or not) in it following Brexit. If the UK does not remain within the system upon Brexit, the simplest approach from the perspective of the UK, in terms of legal certainty, commercial certainty for stakeholders and legislative burden, would be for the UK simply not to ratify the UPC Agreement. In any event, achieving clarity in this area should be a priority for the UK Government.

In addition, if the UK is to exit the harmonising regime for SPCs when it exits the EU, the availability of SPCs covering the UK should be preserved by the preservation of the *acquis*. In addition, 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 national regimes in the areas identified by the numerals e. (limitations on the effect of a patent), m., n., o., p., q., and r. above, 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 UK 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 UK Government. The UK Government (and the UK IPO) should likewise continue to draw upon the expert resource that exist 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 two 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 and David Barron, Gowling WLG, 13 July 2017