

“BREXIT” and Intellectual Property Protection in the UK and the EU

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The UK referendum vote of 23 June 2016 on “BREXIT”, in favour of leaving the European Union (EU), will have significant consequences for the protection of intellectual property (IP) in Europe. Although the procedure by which the UK will leave the EU has not yet been initiated and will then take at least two years to complete, during which time the UK will remain a member of the EU, in the short term the most immediate effect had been thought to be the delay which it would occasion to the entry into force of the new Unified Patents Court and new European Patent with unitary effect, although at the end of November 2016 the UK Government, to the surprise of many, indicated that it would still proceed with ratifying the Treaty that underlies this new system. In the longer term BREXIT will limit the geographical scope of certain unitary EU IP rights, which will in due course cease to apply in the UK, and will require in some cases that the UK introduce national legislation corresponding to a degree to the EU legislation that will no longer apply to the UK. The precise nature of the consequences for the UK will depend on whether or not the UK becomes a member of the European Economic Area (EEA), although given that doing so would require adherence to many principles of EU law to which those who campaigned for BREXIT most strongly objected, the political viability of this option seems uncertain.

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The pro-BREXIT vote in the UK referendum on 23 June 2016 in favour of leaving the EU will have significant consequences for IP protection in Europe. Although the procedure by which the UK will leave the EU, under Article 50 of the Treaty on European Union (‘TEU’), has not yet been initiated and, once it is, will take at least two years to complete, during which time the UK will remain a member of the EU, in the short term its most immediate effect on EU IP had been thought to be to delay the entry into force of the new Unified Patents Court (UPC) and the new European Patent with unitary effect. However at the end of November 2016 the UK Government, to the surprise of many, indicated that it would still proceed with ratifying the Treaty that underlies this new system.

In the longer term the UK exit from the EU will limit the geographical scope of certain unitary EU IP rights, which will on such exit cease to apply in the UK, and will require in some cases that the UK, in order to comply with TRIPS, or more general international IP norms amongst developed countries, including those TRIPS plus norms mandated by Free Trade Agreements with the EU and the USA,

introduce national legislation to fill the lacunae left by EU legislation (such as that relating to geographical indications) as this will no longer apply to the UK.

The precise nature of the consequences of BREXIT for EU and UK IP will depend on whether or not upon exit from the EU the UK adheres to the EEA Agreement, a Treaty between Iceland, Liechtenstein and Norway, and all EU Member States. By virtue of the EEA Agreement, such non-EU countries secure access to the EU single market, but must agree to implement EU Directives, other than in certain specific areas such as agriculture, but including those as to IP, into their national laws. They must also accept certain other aspects of the EU Treaties, most notably the free movement of people, and make substantial contributions to the EU budget, both of which aspects of EU membership appear to have been significant drivers for those who voted in favour of BREXIT, thereby making it politically difficult for the UK to adhere to EEA Agreement on leaving the EU. Moreover even if it were to wish so to do, its ability to do so is not a foregone conclusion as the consent of the existing Members of the EEA, including the EU, would be required. Similarly the network of agreements which Switzerland was able to negotiate with the EU when it chose not to join the

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EEA also mandate the free movement of people, although a referendum there a few years back called for the renegotiation of this feature of these agreements by the end of 2016.

Other recent free-trade arrangements with the EU, such as those entered into by Australia, Canada and South Korea, and which might provide models for post EU exit free trade arrangements between the UK and the EU, but without requiring the free movement of people, mandate certain TRIPS plus minimum IP norms, but in ways which, unlike the EEA Agreement, permit of a considerable degree of latitude in the specifics of implementation.

The Unified Patent Court and the European Patent with Unitary Effect

Previous articles in this series¹ have discussed the progress towards implementation of the UPC Agreement and the European patent with unitary effect, which had, before the result of the BREXIT referendum became known, been expected to enter into force early in 2017. The formal position of the UK Intellectual Property Office shortly after the referendum was that “The UK remains a Contracting Member State of the Unified Patent Court at present. We will continue to attend and participate in UPC meetings in that capacity. There will be no immediate changes.”²

This was silent however as to the UK position on ratification of the UPC Agreement. As matters stand the UPC Agreement (and thus the European patent with unitary effect, which would be granted by the EPO over a territory corresponding to those EU Member States that have ratified the Agreement) cannot enter into force until such time as the UK ratifies the Agreement. The UK ratification of the UPC Agreement is necessary for it to enter into force as it requires ratification by thirteen Member States including the three EU Member States with the largest number of classical European patent validations in 2012, namely France, Germany and the UK. France has already ratified and Germany is preparing to do so; as was also the case for the UK until the BREXIT vote. Ratification by the UK would, many thought, be highly unlikely, as it is hard to envisage how, as a matter of EU law, the UK, once it leaves the EU, could participate in the UPC and be a territory in which the new European patent with unitary effect could have effect. Thus if the UK were to ratify the Agreement now, as some urged,³ this would have to be done in the knowledge that special transitional

arrangements would have to be made in only a few years’ time to address the consequences of the UK no longer being able to participate in the system, in particular for those European patents with unitary effect that had already been granted, and for litigation in the UPC that was already under way.⁴

Some creative proposals aimed at avoiding this block to the ratification of the UPC Agreement and the entry into force European Patent with Unitary Effect have been suggested, but none address the fundamental incompatibility with the EU Treaties of a non-EU Member State participating in an EU Court. The fundamental nature of this problem was made clear by the Court of Justice in its 2011 Opinion on the precursor to the UPC Agreement, namely the Agreement establishing a European and Community Patents Court,⁵ participation in which would have been open not only to all EU Member States but also all other members of the European Patent Convention. The Court concluded that:

“... the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law.”

Neither does it seem possible that the view of the Court of Justice would differ even were the EU Treaties, as part of the BREXIT negotiations, to be so amended as expressly to provide for UK participation in the Unified Patent Court once it ceases to be a member of the EU. Thus, the Court of Justice has more recently held that the Agreement on the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms was not compatible with the EU Treaties despite these same Treaties expressly providing for such accession.⁶ In so doing the Court observed, referring to its 2011 Opinion on the Agreement

establishing a European and Community Patents Court, that it had "already had occasion to find that jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU."

Absent UK ratification of the UPC Agreement or its amendment to exclude the UK from its scope (to which amendment process the UK would have to be a party) the Agreement cannot enter into force whilst the UK remains in the EU. Absent UK ratification then, once the UK leaves the EU, which cannot be before 2019, it could be argued that the Agreement could enter into force on the basis of the Netherlands (or perhaps Italy), as the country with the next largest number of classical European patent validations in 2012, after France, Germany and the UK, taking the place of the UK for the purposes of ratification. Even then some amendment to the Agreement would be necessary, as Article 7(2) of the Agreement specifies that one section of the Central Division of the UPC be located in London, and it is hardly credible that this such a situation would be tolerated if the UK were not to participate in the UPC.

However, given that the European patent with unitary effect, which is established under the EU "enhanced cooperation" procedure, does not require that all EU Member States participate, an alternative approach might be for those other EU Member States which wish so to do to enter into a Mark II UPC Agreement that does not include the UK. Such an Agreement could be identical to the Mark I UPC Agreement other than as to its ratification criteria and as the location of the Central Division of the UPC.

However, this discussion would seem now to be moot as on 28 November 2016 the UK Government announced that, notwithstanding the referendum result, it proposed ratifying the UPC Agreement to enable the system to enter into force, which is now expected to happen some time in 2017. In its announcement the Government made it clear that "the decision to proceed with ratification should not be seen as pre-empting the UK's objectives or position in the forthcoming negotiations with the EU" but the announcement did not suggest there were any difficulties with this approach, such as those identified above, or whether any thought had been given as to how such difficulties might be resolved.

Unitary Intellectual Property Rights

Although much IP protection in the EU is provided by national IP rights, most of which are to a greater or lesser extent harmonised by various EU Directives as discussed below, protection in certain areas of IP is also provided at an EU level by unitary rights that cover all EU Member States, namely the EU trade mark,⁷ the Community design,⁸ and the Community plant variety right.⁹ Countries that are not EU member States, even if they are EEA Member States, do not participate in such unitary rights and are not subject to them. Accordingly once the UK leaves the EU, such unitary EU intellectual property rights will cease to apply in the UK. It remains to be seen what, if any, transitional provisions will be put into place by the UK Government to allow for the conversion, as to the UK, of unitary EU trade marks, Community designs and Community plant variety rights where already granted or applied for, into the corresponding national rights, and so the more prudent course for those seeking to protect such rights in the UK is now to apply for rights nationally in the UK and not to rely, for protection in the UK, solely on unitary EU rights. As has been previously observed in this series, there can in any case be certain benefits, at least when it comes to protecting trademarks nationally in the EU, to do so by means of national registrations as opposed to unitary EU ones.¹⁰

The position with geographical indications for wines, spirits and foods, which are protected by various EU Regulations,¹¹ is more complex. Whereas there are UK national rights that correspond to each of the unitary EU ones in the cases listed above, and so would fulfil the UK's treaty obligations under TRIPS, there is, with a few isolated exceptions such as Scotch Whisky, no national UK system expressly directed to the protection of geographical indications, although these can be protected to a degree as certification or collective marks under the UK Trade Marks Act 1994 and by the common law protection provided by the law of "passing off". Although such national protection might well meet the relatively limited norms mandated by TRIPS, the EU confers a notoriously high level of protection on geographical indications, which it seeks also to incorporate to a degree in the Free Trade Agreements that it negotiates with third countries. It also requires such protection by non-EU EEA Member States, at least as to wines and spirits, although, as agriculture is excluded from the scope of the EEA Agreement, the EU cannot

require such protection for foods, but instead seeks to do so by separate Treaties. Such Treaties with Iceland and Norway are still in the process of negotiation, more than 10 years after the entry into force of the EEA Agreement in 1994. Thus, if the UK adheres to the EEA Agreement on leaving the EU it will have to introduce national legislation protecting geographical indications for wines and spirits corresponding to the EU legislation, and will be under pressure to do so as to foods; even if it enters into another type of Free Trade Agreement with the EU it will remain under pressure to protect geographical indications to a greater extent than mandated by TRIPS, especially as geographical indications are already well protected in the UK by virtue of EU legislation, and the EU will be keen that it preserve this level of protection.

Harmonised National Intellectual Property Rights

Leaving the EU will not of itself, strictly speaking, necessitate any amendment to those aspects of national IP law in the UK which have already been the subject of EU harmonisation. As to specific IP rights these are the several Directives that harmonise or establish various IP rights, namely those which harmonise aspects of copyright and related rights,¹² and those which harmonise trademarks,¹³ registered designs,¹⁴ and patents for biotechnological inventions,¹⁵ as well as the Regulations establishing Supplementary Protection Certificates (SPCs) for medicinal products and plant protection products and which provide for a de facto extension of patent term for such products.¹⁶ If the UK adheres to the EEA Agreement any amendment to its IP legislation in such harmonised areas would have to be consistent with such Directives and Regulations. If, as seems more likely, the UK does not join the EEA, it seems likely that it will leave matters largely as they are, at least initially, although it will be open to it to amend its IP law in ways that are inconsistent with such EU legislation, and in certain specific areas there may be sound policy reasons for so doing when it leaves the EU.

One such example is that of exhaustion of rights. On ceasing to be a member of the EU, and assuming it does not become a member of the EEA, the UK would no longer be obliged, as it is currently, as a member of the EU, to apply EU/EEA exhaustion of rights principles by which UK IP rights cannot be used to prevent the import of goods which are first placed on the market by or with the consent of the IP

rights holder elsewhere inside the EEA, but must allow such rights to be used to prevent the import into the UK of goods first placed on the market by or with the consent of the IP rights holder outside the EEA. This is especially so when the continuing EU member states would continue to apply EU/EEA only exhaustion principles, thereby requiring that their IP rights be capable of being asserted against imports from the UK, once it had left the EU. Outside the EU or EEA the UK would be free to apply whatever exhaustion of rights principles it chose, and so could for example revert to its previous approach of applying international exhaustion to trademarks, but UK only exhaustion to copyright.

Another concern SPCs which, although established under EU Regulations rather than Directives, are national intellectual property rights, and so the EEA Agreement mandates that non-EU member states of the EEA adhere to the EU SPC system. Not only is the duration of an SPC keyed to the first marketing authorisation in the EU or EEA for the product in issue, but the availability in the UK of an SPC is keyed to there being a marketing authorisation in the UK granted under EU law. This should not affect SPCs that have already been granted or applied for once the UK leaves the EU but would, unless it joins the EEA, and without amendment, prevent further SPCs being granted. It seems unlikely that the UK Government would countenance such a situation and so it would then wish to enact, like Switzerland, its own SPC regime, with the availability of the right and its term keyed to the first marketing authorisation in the UK, recognising that it would also have to establish a medicines regulatory regime and a plant protection products regulatory regime which, unlike those at present in place, is independent from that established under EU law, along the lines perhaps of those in place in Switzerland. Such regulatory regimes would have also to provide for data exclusivity, consistent with Article 39(3) TRIPS, as do those in Switzerland.

There is also the question of those Directives that have been enacted but have not yet been implemented in UK law. Much of the newly enacted trade mark Directive,¹⁷ has to be implemented nationally by 14 January 2019, which may well be around the time of the conclusion of the two years long Article 50 TEU procedure by which the UK leaves the EU. Given that it will require little change to UK law and procedure, in view of the manner in which the original trade

mark Directive was implemented, it seems likely however that any of the minor changes it mandates will be implemented. The recently enacted trade secrets Directive,¹⁸ which is designed to harmonise the civil law on trade secrets and how it is enforced across the EU, is a different issue. EU Member States are required to implement its provisions by 8 June 2018, which will be before the conclusion of Article 50 TFEU procedure. Although the requirement to implement this Directive might under other circumstances have been taken as an opportunity to codify the UK law on trade secrets, which is at present entirely judge made, the UK Government may however, unless the UK decides to seek to join the EEA, now take the view that UK trade secrets law already complies to a considerable degree with the Directive and that such codification, which would be complex as it would, in order to be complete, have also to address a number of issues left open by the Directive, is unnecessary.

Directives and Regulations as to Procedure in IP Matters

In addition to the Directives and Regulations that harmonise or establish substantive IP rights there are also various measures, either specific to IP, or of general application, that establish or harmonise various aspects of procedure.

Specific to IP is the enforcement Directive¹⁹ and the customs Regulation.²⁰ The implementation of the former required hardly any change to UK law and UK law can be expected to continue to be consistent with it once the UK leaves the EU, even though there is no requirement for this unless at such time it joins the EEA. The customs Regulation would however, in such circumstances, no longer apply to the UK and so would require replacement by a UK measure in order to comply with Article 51 to 60 of TRIPS.

Of more general application, but not requiring any replacement legislation in the UK, at least in relation to IP, are the E-Commerce Directive²¹, in so far as it mandates "safe harbours" for internet intermediaries and the Rome II Regulation as to applicable law, as whilst ceasing to apply to the UK in the area of IP it merely as to this restates international norms.²² Also of general application, but more problematic, is the Brussels 1 Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.²³ This will cease to apply to the UK and although this is largely paralleled, for the

EEA countries and also Switzerland by the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as with the EEA Agreement, the UK has no right to adhere to this without the consent of the other parties to such Treaty, one of which is the EU.

EU competition law plays a major role as to both the exploitation and enforcement of IP in the EU, and although the UK has its own parallel competition law regime based on EU law this is at present little developed in terms of IP. Thus, as to IP exploitation it relies on EU law, adopting the approach of conferring a "parallel exemption" from the prohibition under UK national law against anti-competitive agreements under which an agreement that is covered by an EU Block Exemption Regulation²⁴ is also exempted under UK competition law. This situation can hardly continue in such terms if the UK leaves the EU and does not adhere to the EEA, which has a competition law regime that corresponds to that of the EU, but it seems unlikely that the UK would wish to diverge, at least initially, from the competition law principles underlying such Block Exemption Regulations and their accompanying Guidelines, so these might simply be copied into UK law.

What Now?

No changes will take place immediately, and the doubts as to the entry into force of the proposed Unified Patent Court and the European Patent with unitary effect have now been resolved, even though doubt remains as to the longer term consequences of BREXIT on the system which will thereby be established, and which in and of itself represents a major source of uncertainty. Article 50 TEU envisages a two year period of negotiation between the UK and the other members of the EU as to the terms on which the UK will leave the EU, which has yet to be initiated. However, as explained above, there is in fact very little about which to negotiate in the area of IP; the unitary rights would cease to apply to the UK whatever happens but either the UK (with the consent of other members to the EEA Agreement, including the EU), accedes to the EEA Agreement, or something very much like it, which would mean much of its law would have to continue to track that of the rest of the EU, but which course seems unlikely, or it does not. This latter alternative would leave the UK in the position of a third country which may or may not have a Free Trade Agreement of some sort with the

EU but whose national laws, whilst initially much the same as those in the rest of the EU, need no longer be so, but will need in some specific areas immediate amendment and may well then go on to diverge over time. In this latter case it will be for the UK Government to determine the scope and extent of the further legislation which it must introduce in order to fill in the lacunae left by the EU legislation that will no longer apply in the UK, but as to which the UK must legislate to a degree not only to comply with its TRIPS obligations, but also to reflect those areas of IP as to which the UK chooses to legislate as a matter of policy. It is likely however that such new legislation will correspond quite closely with the old – as with Switzerland, the countries of Europe have too much in common in matters of IP to diverge too far in matters of substantive law, irrespective of whether or not they are members of the EU or the EEA.

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