

## **Brexit Article: Impact on IP rights in the UK and EU**

### **Introduction**

On 23 June 2016, the UK made history by voting to leave the European Union ("EU"). 51.9 per cent of those who voted favoured a so called "Brexit". This decision was opposed by approximately 48.1 per cent who voted to remain.

The outcome of the referendum was unexpected and has triggered a period of instability in the EU, as various stakeholders grapple with what Brexit really means for the UK, the EU and their trading partners across the globe. It has been speculated that the UK's exit might encourage other dissatisfied EU Member States to review their position within the EU. Indeed, the EU Commission is keen to secure a quick exit for the UK to minimize the disruption to the rest of the EU.

For foreign investors in the EU and other businesses actively trading across the EU, Brexit will likely have an impact in several ways, from currency fluctuations (the value of sterling crashed when the referendum result was announced), potential contractual disputes as licences are reviewed and perhaps terminated, new regulatory frameworks to work within and new UK and EU wide legislation to implement. This article will focus specifically on the potential changes to the intellectual property regimes in the UK and the EU in the coming years. Although there are many unknowns, it would be wise for companies doing business in the UK to keep abreast of the developing situation so they will be best prepared to make any necessary adjustments to their IP strategies.

### **Current Status**

The referendum vote itself does not definitively trigger departure from the EU and, indeed, it is not legally binding on the Government to do so. However, it is highly likely that the UK will leave the EU once it has negotiated detailed terms for its departure, a process which itself is likely to take years.

In order to leave the EU, the UK must serve a notice pursuant to Article 50 of the Treaty of Lisbon.<sup>1</sup> This has not yet happened. Shortly after the decision for Brexit was announced, the then UK Prime Minister, David Cameron (a supporter of the "Remain" campaign), resigned from office to make way for a new Conservative Prime Minister, who was recently announced as Theresa May. Mr Cameron has said that it will be the responsibility of his replacement to decide when and how to initiate the Article 50 process. Mrs May assumed her position as Prime Minister on 13 July and is now under intense pressure to work with the EU Commission and clarify what Brexit will mean in practice, so as to dispel the confusion and anxiety currently felt by most stakeholders globally.

Once the Article 50 notice is filed, there will be a further period of two years during which the UK will negotiate the terms both of its departure from the EU and the relationship it will have with the EU going forward. It is not certain whether this is a realistic or achievable time frame, or whether the EU would consider extending this period.

Accordingly, it is highly likely that the UK will remain a member of the EU until late 2018 at the very least. In this article we provide our current view of how intellectual property rights will be affected during this two year period and going forward.

## **The Current IP System in the UK and EU**

Currently, the UK is subject to both national and EU legislation governing IP rights. Importantly, judges hearing IP cases in the UK courts are ultimately subject to the Court of Justice of the European Union (CJEU). Indeed, it is largely as a result of national court referrals to the CJEU on complex IP issues, particularly on copyright and trade mark rights, that the law in this area has developed so dramatically over the past decade or so.

For trade marks and designs, there is a choice of seeking registered protection at a national UK level (via a UK Trade Mark and a Registered UK Design) and/or at an EU wide level (the EU

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<sup>1</sup> 2007/C 306/01

Trade Mark and the Registered Community Design). It is also possible to have unregistered trade mark and design right protection at a national (UK) level and, for designs, at the EU level (Community Unregistered Design).

Owners of EU Trade Marks and Registered Community Designs are able to enforce these rights throughout the EU by way of pan-EU injunctive relief.

Copyright is an unregistered national right in the UK and in each of the other Member States. There is no pan-EU copyright although there is EU legislation governing important aspects of copyright, which has been implemented into national UK law (for example the Copyright Directive on the harmonization of certain aspects of copyright and related rights in the information society).<sup>2</sup> The EU Commission is also preparing to draft new legislation aimed at further harmonizing copyright law across the EU.

For patents, there is the choice of a UK Patent or a European Patent. The latter does not derive from EU legislation and is not an EU-wide right, but rather derives from the European Patent Convention which is an international agreement separate from the EU.

## **The Impact of Brexit on IP Rights**

### **1. Patents**

The current patent system in Europe, both prosecution and litigation, will not be affected. The UK will remain a member of the European Patent Convention and European Patents will continue to extend to the UK. As mentioned above, European Patents derive from the European Patent Convention and this has no connection with the EU – it is a separate self-standing convention.

The EU has however been central to the proposed revision of the patent system in Europe. Much

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<sup>2</sup> Directive 2001/29/EC; also the Satellite and Cable Directive 93/83/EEC; and the Collective Management of Copyright (EU Directive) Regulations 2016 implementing Directive 2014/26/EU

progress had been made on this in recent years and a new system was expected to come into force next year, comprising a Unitary Patent and a Unified Patent Court (“UPC”). The Unitary Patent is a single patent which would cover most EU member states. The UPC is a cross-jurisdictional court for litigating the new Unitary Patents and also existing European Patents. At the time of writing, all EU member states have signed the UPC Agreement except Spain and Poland.

In order for the Unitary Patent to come into force, the three EU member states with the highest number of effective European patents in the year preceding the signature of the UPC Agreement must ratify it. Currently, the UK, France and Germany are the three member states that would meet this criteria. When the UK leaves the EU, either the Netherlands or Italy are likely to take its place as the third member state. The Brexit vote will likely affect the launch of the new system as there will be no political impetus for the UK to ratify the UPC Agreement in the short term while it negotiates its exit from the EU. The UK’s departure will also likely trigger a reassessment of the whole system, given the UK’s prominence in the patents field not only by virtue of the volume of effective European patents filed in the UK but also with London appointed as one of the branches of the UPC.

When the Unitary Patent and UPC are eventually introduced, it is difficult to see how the Unitary Patent (being an EU product) could extend to the UK. There is more uncertainty about the UPC. On the current premise, the UK will also not participate in the UPC, though there may be negotiations on this given that it was intended that a division of the UPC was to be hosted in London (with other divisions located in Paris and Munich). What is clear is that the Unitary Patent and the UPC will require further amendment and negotiation before they can be implemented in order to take into account the impact of Brexit.

## **2. Trademarks and Design Rights**

EU Trade Marks (“EUTMs”) and Community Registered Designs will be affected by the UK leaving the EU, most likely by the UK coming off the list of territories in which the rights are protected. It may be that the existing right could be converted into a national UK right,

benefitting from the original priority date, or it may end up that the rights holder will need to apply separately for a new UK right before the UK Intellectual Property Office (“UK IPO”). Either way, there will need to be legislation introduced to implement the procedure. Of course, there is also a possibility that the UK will negotiate an exit option which will enable the country to continue to participate in the EU trade mark and registered design right systems, and it is this option that is likely to find most favour with rights holders.

Until more is known about the nature of the new legislation that will be implemented, it is advisable for trade mark and design right owners to continue to file and maintain applications as normal. Those seeking to file new trade mark or design right applications over the next couple of years can either choose to file an EU-wide application and take advantage of the conversion procedure when it is implemented or, alternatively, they can file both UK and EU applications now in order to avoid going through the conversion procedure at a later date.

Owners of existing EUTMs again are likely to retain protection in the UK post-Brexit under a conversion process. It is assumed that any procedure for conversion of existing EU Trade Marks into EU and UK marks will ensure that the newly created UK mark will benefit from the same filing date as the earlier EU mark. This would certainly seem fair and reasonable but it is currently uncertain how any of this will play out. Some EUTM owners are therefore leaving nothing to chance and are adopting a belts and braces approach by filing separate UK trade mark applications now. This will, of course, incur legal fees (both the UK IPO filing fees and fees of local counsel to prepare and submit the applications) and, crucially, such applications will not benefit from the same priority date as the previous EU wide applications. They may also be subject to challenges from third parties asserting local prior rights (and will likely end up being trumped by any UK rights carved out of the EU Trade Mark registrations under a conversion process in any event).

One potential pitfall for owners of EU Trade Marks which are only used in the UK is that they could become vulnerable to revocation for non-use if they are not used in another member state when the UK leaves the EU.

One of the great benefits to rights holders of harmonized EU IP rights such as the EU Trade Mark, Community Registered Design and Community Unregistered Design is the potential pan-European injunctive relief against infringers. This allows rights holders to litigate in one Member State but obtain an order which is enforceable across the whole of the EU. That will likely no longer be an option as far as the UK is concerned once it exits the EU, unless a similar arrangement can be negotiated.

EUTM owners should also be aware that the principle of exhaustion of rights will probably cease to apply to the UK following Brexit. This principle is derived from EU legislation and prevents an EUTM owner from objecting to parallel imports of goods bearing the EUTM once those goods have already been put onto the EEA market by the rights owner or with his consent. As a result of Brexit, the owner of a EUTM could in the future object to goods bearing its EUTM being imported into the EU from the UK.

Obviously UK trade marks and UK designs will remain unaffected and applicants focused on protection of their rights within the UK should continue to file as normal. It is also worthwhile stakeholders keeping abreast of political developments in Scotland and Northern Ireland, given that both of these UK countries voted to remain within the EU and are actively considering their options for doing so notwithstanding the referendum outcome.

### **3. Copyright**

Many commentators have assumed that copyright in the UK and the rest of the EU will remain unaffected by Brexit, on account of the fact that copyright has not been harmonized across the EU and remains a national right in each member state.

However, that is an over-simplified view. The fact is that over the past decade, copyright law in the EU has developed much faster than that relating to any other IP right, as a result of the impact of the internet on the way in which copyright content is used and exploited. This has

resulted not only in a raft of complex copyright questions being referred by national courts to the CJEU but also in new copyright legislation at the EU level such as the Copyright Directive<sup>3</sup>.

Indeed, one of the main aims of the EU Commission's recently launched Digital Single Market Strategy<sup>4</sup> is to ensure increased harmonization of on-line trade throughout the EU by eliminating barriers to distributing and accessing copyright content on a pan-European basis.

To date, UK stakeholders have been among the most active and numerous in responding to, and engaging with, the EU Commission on its consultations for such new legislation. It is now questionable to what extent, if at all, the UK will be subject to, or have any influence over, copyright law and developments in the EU going forward. There is a concern that UK law will henceforth start to diverge away from the rest of the EU, particularly as UK litigants will no longer be subject to rulings by the CJEU.

However, this seems unlikely as such a divergence would simply serve to frustrate all rights holders, intermediaries and end users of copyright content who operate on a cross-border basis. Those stakeholders need legislation which clarifies and facilitates the complex copyright rules relating to such cross-border activity. That clarification and facilitation is more likely to arise from further legislative harmonisation in Europe, rather than fragmentation.

It is worth noting that if the UK leaves the EU but remains in the European Economic Area (EEA) (the so-called "Norway option") then EU copyright law would continue to apply to the UK. CJEU case law, however, would no longer be applicable. This would lead to a somewhat complicated situation in which EU copyright laws would continue to be implemented and followed, but the CJEU could no longer offer advice on their interpretation. The Norway option is so-called because it is the position adopted by Norway, Iceland and Liechtenstein whereby these countries have agreed to accept the founding EU principle of free movement of goods, services and people in exchange for gaining access to the single EU market.

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<sup>3</sup> 2001/29/EC

<sup>4</sup>The strategy is to introduce EU-wide legislation and reform aimed at reducing barriers to the free movement of goods and services online. See [http://ec.europa.eu/priorities/digital-single-market\\_en](http://ec.europa.eu/priorities/digital-single-market_en)

#### **4. Trade Secrets/Confidentiality**

The law of confidence (also known as trade secrets) has historically been created and decided on a national level throughout the EU, and so Brexit would not impact upon that. However, in April this year, the EU Parliament adopted the Trade Secrets Directive which aims to harmonise the definition and protection of trade secrets across all EU member states. Individual member states have until July 2018 to implement the Directive into their local law. As with the ratification of the Unitary Patent Agreement, it is unlikely that the UK will in fact implement the Trade Secrets Directive as it will be negotiating its exit from the EU at that time. In any event, UK law is already compliant with most of the standards set by the Directive for the definition and protection of trade secrets. Therefore, Brexit is not expected to have a major impact although it will be interesting to see how the UK's law of confidence develops once it leaves the EU and whether it follows EU law in order to remain attractive to stakeholders who will find a harmonized European standard easier to comply with. There is also the issue of data transfer out of the EU, which is highly regulated and to which the UK will be subject once Brexit is effective.

#### **5. IP Licensing**

Many businesses operate under a pan-European Union IP licence, or will have some other contractual arrangement in which the definition of the EU has a major impact upon the practical significance and value of the contract. Indeed, some contractual parties may now be reviewing such definitions with a view to terminating their contracts by arguing that there has been a material change not anticipated by either party, akin to force majeure. Where IP contracts define the EU as “the Member States of the European Union from time to time”, such attempts at termination on the ground of Brexit are unlikely to succeed, as it is clear that the parties envisaged that the constituents of the EU may change from one time to another. If, on the other hand, a contract were to define the EU as “the 28 Member States of the European Union as at the Execution Date”, then it is arguable that it was the parties' intention for the UK to be covered by the contract and that, if this is no longer possible in the future (eg if the licence is for a Community Trade Mark or some other IP right which will no longer be protectable in the UK), then there may be a valid argument for termination.



The very fact of Brexit is also likely to make parties more cautious as to how they define the EU in future contracts, as it is very possible that other countries may exit or join the EU in coming years; so clear contractual wording is needed to reflect and adapt to this. Either way, it is predicted that Brexit will result in an increase in contractual disputes and it is advisable for business to start an audit of their EU contracts in order to anticipate any issues.

## **Conclusion**

Ultimately, the future of UK IP law is currently unclear and will continue to be so until the UK and the EU have negotiated the terms of Brexit. For the time being, IP rights holders should continue to comply with UK and EU IP law as they remain bound by both for the next two years at the very least. Any changes that do occur are likely to be heavily negotiated and gradually implemented through new legislation allowing IP rights holders to adapt their practices in good time.

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