

The Brexit Papers



Intellectual Property

Paper 16



Bar Council Brexit
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**THIRD
EDITION**



Brexit Paper 16: Intellectual Property

Summary

The UK is a highly attractive place for R&D and the creative industries, in which intellectual property plays a key part, but it may not remain so if it is not central to European activities.

The intellectual property bar is very active and the excellence of the courts is widely appreciated, making a significant positive contribution to our success in this field.

However, given the large degree of EU harmonisation of laws in this field, the consequences of Brexit could be particularly severe.

Particular dangers exist where rights are directly granted under EU law which are effective in the UK (such as EU registered trade marks and designs). The impact of ceasing to be a member of the EU would be that the rights in question would cease to exist in the UK (unless otherwise provided for).

To counteract this, UK Intellectual Property Office is considering whether to provide for equivalent rights under English law or, at least a set of transitional measures to ensure that existing rights owners do not face a gap in protection.

- We urge the Government to ensure that the UK remains more efficient and quicker as a litigation forum than other EU countries and EU courts. If the Unified Patent Court goes ahead, which the Government very recently said it will participate in, the UK should be fully able to participate in it post-Brexit.

The Impact of Brexit on Intellectual Property

Intellectual property cases involving barristers in England and Wales

1. Intellectual property disputes in the English courts mainly concern the following areas, although some cases cover overlapping areas:

1.1. **Patents.** These tend to be high value (>£10 million) disputes which are currently heard in the High Court, Patents Court, predominantly between international litigants fought over multimillion pound markets and some smaller cases <£500,000 value fought before the Intellectual Property Enterprise Court (IPEC). Barristers are heavily involved in both kinds of case. Although patent law is mainly derived from the EPC, not from EU law, significant areas of patents have been harmonised by EU law including the important area of Supplementary Protection Certificates and the areas of biotech inventions and Compulsory Licenses.

1.2. **Trademarks and passing off.** These are largely disputes heard by the High Court and IPEC, and before the UK Intellectual Property Office (IPO) (and on appeal to the Appointed Persons or the High Court) and the EUIPO (and on appeal to the General Court and CJEU). Many of these cases, particularly of higher value or importance, involve barristers. Almost all trade mark law is derived from the EU either by way of the Trade Marks Act 1994 (implementing the Trade Marks Directive) or by way of the EU Trade Mark Regulation providing for EU Trade Marks (EUTM). The English court has regularly made references to the CJEU in these disputes.

1.3. **Copyright and designs.** There is a great diversity in copyright cases- some involve very substantial industry disputes (over, for example, rights licensing principles) and in cases between individual rights owners and users, often in IPEC. Barristers are involved in a large proportion of them. A large proportion of copyright law is derived from EU law, through the implementation of EU Directives.

There is also a EU Registered Designs system and a UK system pursuant to EU law. Legal representation in such cases (large and small) is often undertaken by teams involving barristers.

1.4. **Confidential information.** These cases are very diverse. Higher value cases are brought in the High Court and barristers are almost always involved. The principles of trade secrecy law have recently been harmonised by a EU Directive although the UK has not yet implemented it. Those principles are broadly similar to those already existing in English law and English law may be influenced by the development of EU jurisprudence in this area.

1.5. **Related areas of law.** Other kinds of work which may be undertaken by barristers include Plant Varieties, Protected Geographical Indications and Protected Designations of Origin, which are the subject of EU laws.

In addition, intellectual property cases often involve elements of EU competition law in which barristers are involved. There is a significant element of EU law relating to remedies for breach of intellectual property rights under the Enforcement Directive.

Impact of Brexit

2. Brexit is likely to have an impact on intellectual property practice in the following ways.

2.1 **Substantive law.** In areas where rights are directly granted under EU law which are effective in the UK (such as EU registered trademarks and designs), the impact of ceasing to be a member of the EU would be that the rights in question would cease to exist in the UK (unless otherwise provided for). To counteract this, the UKIPO is considering whether to provide for equivalent rights under English law or, at least, a set of transitional measures to ensure that existing rights owners do not face a gap in protection. These considerations will address the various complexities, including the basis upon which the rights of proprietors and third parties may be protected. In this, the UK Government faces a challenging exercise, with no guarantee that the outcome will satisfy everyone. Assuming UK rights can be secured in this way; it seems unlikely that they would be identical to those conferred by the EU systems. That said, in many cases they would probably be similar. Moreover, this is likely to be an issue for specific areas of intellectual property law since much of it is enacted in domestic legislation or SIs made under the ECA 1972. The latter SIs would probably fall with simple repeal of the ECA but could be preserved by appropriate UK legislation.

Consideration will also need to be given to the future application of the principle of the free movement of goods and the doctrine of exhaustion of rights, whereby the proprietor of a UK IP right cannot exercise his right to prevent the importation and sale in the UK of goods which were first placed on the market in another EU Member State by him or with his consent (i.e. parallel imports).

2.2 **Interpretation of law.** As indicated above, a significant proportion of current intellectual property rights are conferred pursuant to EU legislation (arising under EU Regulations or UK statutes implementing EU Directives) and their scope ultimately falls to be determined by the CJEU upon reference from national courts. If that ceases to be possible following Brexit, the UK courts would have the final say as to the scope of rights originally conferred under EU law. There is a real risk of jurisprudential divergence. Moreover, unless provision was made to ensure that the UK (and undertakings in the UK) could continue to present arguments at the CJEU, including in cases pending at the date of exit, by way of interventions, the influence of English law principles, which has been considerable (and positive), in this area would be seriously diminished.

2.3 **Development of law.** After Brexit, unless steps are taken to ensure that the interests of businesses in the UK and of businesses in other countries wishing to continue trading and to protect their rights in the UK, are taken into account in

developing new IP regimes in the EU, such undertakings will not be adequately catered for in the UK and may be less able to influence the legislative process. At present, the UK's voice is of considerable importance both at the legislative stage and in interpretation of the law at CJEU level. For example, the EU is currently undertaking a thorough revision of its copyright regime, an exercise in which the UK ideally should be influential.

2.4 New courts and tribunals – the UPC. In the field of patents, the coming into effect of the Unified Patent and the Unified Patents Court regime currently depend on ratification by the UK. The UK government has indicated that it was proceeding with preparations to ratify the UPC. The UK has been important in establishing the UP/UPC and is currently set to play a major role in it. London was strongly promoted by the UK Government as the location of one of the central divisions under the UPC. Patents with life sciences as their subject matter are to be litigated in this division. It is therefore of significant economic importance, not simply from the point of view of the provision of legal services but in other respects that life sciences patent litigation under the UPC to be conducted in London. London and the South East is one of the world's most important clusters of activity in this area. However, at the moment, it is unclear whether and upon what terms the UK would be able to participate in the UPC (and the Unified Patent) following Brexit.

2.5 Recognition and enforcement. The Bar's concerns about the potential loss of the Brussels I regime are set out in its paper on 'Jurisdiction and Judgments', which we endorse. Suffice it to say here that those calls for a new post-BREXIT arrangement should also cover the special provisions in the Brussels I Regulation recast relating to claims concerned with the validity of IP rights.

2.6 Professional practice. At present, English barristers are entitled to represent clients before the following EU courts and tribunals (or would be once the UPC is established):

- CJEU
- General Court
- EUIPO
- EU IPO Boards of Appeal, and
- Unified Patent Court (when active).

3. A significant proportion of cases involving patents and designs, copyright and trade marks originally commenced in English courts give rise to issues which are also litigated before these courts and tribunals. There is often parallel litigation in which English barristers may be instructed both before the UK and parallel EU courts or tribunals. Unless specially provided for, and unless possibly the UK became a member of the EEA, Brexit would mean that, uniquely among lawyers in the present EU, English barristers would not be able to provide clients a full service of representation before all of these tribunals, thus placing them at a competitive disadvantage.

EU market access

4. Please refer to the 'Bar Council Position on Access to the EU Legal Services Market Post-Brexit' for an overview of the current EU arrangements allowing UK lawyers to offer their services on a permanent or temporary basis in other EU Member States, including their enjoyment of rights of audience.

5. These market access rules give clients freedom of choice to include English barristers in their legal teams regardless of forum¹. The advantage to both the clients and the Bar would be lost if these rules do not survive Brexit.

6. Moreover, to the extent that Brexit adversely affects the practices of solicitors' firms, and patent and trade mark attorneys which frequently instruct barristers, that will have an additional impact. Those firms may lose the possibility to present themselves as able to perform the lead litigation/co-ordination role in the EU. If, as is likely to happen unless steps are taken to prevent it, the rights of those Attorneys to represent parties before the EUIPO are also adversely affected, there is likely to be a loss of work for barristers who are instructed by them which may be significant.

7. Overall, unless specific steps are taken to remedy the damage that Brexit may cause, the demand for the services of the English Bar is likely to fall.

Infrastructure for R&D and creative industries

8. These adverse impacts are all the more regrettable, since intellectual property law is an area which provides essential commercial infrastructure to the research intensive and creative industries in the UK.

9. More generally, the UK is a highly attractive place for such activities, but it may not remain so if it is not (or is not perceived to be) central to European activities. London and its periphery, in particular, provide a cluster of activities both in R&D and creative industries and their support services, of which intellectual property protection is a significant part.

Recommendations

10. Intellectual property services are currently a flourishing area in the UK and the UK has significant influence in this area. Rights are well protected but subject to sensible defences. The intellectual property bar is very active and the excellence of the courts is widely appreciated, making a significant positive contribution. It is suggested that the UK Government (HMG) should do the following to ensure that this remains the case:

¹For example, English barristers work closely with Irish barristers in substantial multinational patent cases in the courts of Ireland. Moreover, US firms (for example) frequently instruct English barristers in preference to other EU lawyers in cases where they have a choice.

Securing rights to provide professional services

1. Rights of representation/practice - The IPBA joins and endorses the recommendations and requests set out in the Bar Council Position on *Access to the EU Legal Services Market Post-Brexit*.
 - 1.1.1 UK as forum of choice - HMG should explore ways to ensure that the UK retains its position as a forum of choice for intellectual property matters in Europe. This should include steps to ensure that the UK remains more efficient and quicker as a litigation forum than other EU countries and EU courts. It should also include attempts to ensure that the UK is able fully to participate in the UPC post-Brexit and that, if the UK is not able to do so, the UK is nonetheless well-placed to remain a first-choice forum for resolution of patent disputes in Europe.
 - 1.1.2 Prioritisation - HMG should ensure that the area of specialist legal services, including rights of representation in intellectual property cases, is given no less priority than that given to any other area of services provision in Brexit negotiations in which rights of access to the EU may be important.
 - 1.1.3 Avoidance of approaches to Brexit which would be most likely to damage this sector - The UK should avoid any general approach to Brexit which would make such arrangements harder to secure.
2. Ensuring that post-Brexit there is equivalent protection for intellectual property in the UK as currently exists under harmonised EU law, that there is no gap in protection with regard to existing rights and that defences which currently exist to infringement of intellectual property rights continue to apply unless and until specifically altered.
 - 2.1. Ensuring continuing influence on substantive and procedural EU law which may affect industry in the UK.
 - 2.1.1. HMG should take steps to ensure that the UK perspective continues to be heard by EU legislative and judicial authorities, where decisions are made that may have an impact on UK law and practice.
 - 2.1.2. This may involve ensuring that HMG makes timely responses to EU consultations on legislative change and that it intervenes (and ensures generous rights of intervention for others) in CJEU cases which may have a direct impact on UK undertakings and an indirect impact on UK law after Brexit.

The IPBA would be happy to assist the UK Government in formulating appropriate strategies to this end.

Brexit Working Group / Intellectual Property Bar Association

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