

Brexit Untangled

The implications for Intellectual Property



Intellectual Property has been entangled with the European Union since its inception. Trade Marks and Registered Designs are already granted on a Community-wide basis, and the Unitary Patent is due to come into effect in 2017, supported by a Unified Patents Court for enforcement. What would the landscape look like if the UK voted to leave the EU?

Gordon Harris, co-head of Intellectual Property

One City lawyer has described the position of the legal profession after a vote for Brexit to be like a doctor in a time of plague – plenty of work in the short-term, but an unfortunate longer term prognosis. This could certainly be an apt way of looking at the role of the Intellectual Property profession following a vote to leave the European Union.

Harmonisation of intellectual property rights has been at the heart of the European project. Difficult intangible rights can create barriers to international trade, so eliminating those barriers through a harmonised pan-European system has always been seen as desirable.

At present, it is possible to obtain pan-European coverage for both trademarks and registered designs. The current European patent system is not, in fact, a creature of the European Union – it is governed by a separate treaty – but plans are at an advanced stage for the creation of a pan-European patent which will be available from 2017. This will be backed by a Unified Patents Court, headquartered in London, Paris and Munich.

A vote for Brexit would mean that the UK could not participate in the pan-European systems. Our role as part of the Central Division of the new enforcement court would be lost, probably to The Hague or Milan, and patentees from outside Europe would have to enforce their patents through separate actions in the High Court in London. There is a suggestion that London could keep its Court within the UPC, but that seems hardly credible in a system which does not include the UK.

Similarly it seems likely, subject to post-Brexit negotiations, that anyone looking to protect their trademarks or registered designs in the UK would need a separate registration at the UK Intellectual Property Office going forward. The same would apply to patents.

As a further source of infuriation to remaining EU members, it is likely that the entire UPS/UPC system would be delayed until the actual exit of the UK. This is due to the specific wording of the Agreement under which the UPC is constituted as to the date the Agreement can come into force.

On the face of it this looks like feeding time for lawyers and patent attorneys in the UK. The UK economy is certainly large enough to warrant taking out separate rights, and the need for

additional litigation in the national UK courts to enforce those national rights would seem to guarantee work for years to come.

What looks like good news for lawyers would, of course, be bad news for business which would have to incur the additional cost of national registrations, and the considerable additional cost of litigating in the UK, as against the streamlined procedure envisaged in the Unified Patents Court.

What will actually happen?

In fact, the reality of Brexit is that it would not yield the bumper harvest of transitional work which some anticipate. Trade mark filing is most likely to be done by way of designation under the Madrid Protocol, and similarly, patent filing would be done by designation under the Patent Cooperation Treaty.

The fact that pan-European enforcement and remedies will be available within the Unified Patents Court system will probably marginalise the UK courts, leaving only cases specifically involving the UK market to be fought here. That may be less true in the Life Sciences world where the UK's position as the second largest economy in Europe may support more ongoing dispute work in the national courts.

As things stand, the highly experienced English judiciary are expected to be highly influential in the early years of the UPC, setting procedural policies and establishing the jurisprudence. Brexit would deprive the UPC of those services and potentially result in difficulties with languages as well. The current UPC rules provide that most cases can be conducted in English. It is hard to imagine that being the case if the UK is not participating in the new court system.

One issue which is of particular concern to the Life Sciences sector is that of Supplementary Protection Certificates. These are extensions to the life of a patent where much of the 20 year term has been spent obtaining regulatory protection for the drug or remedy in issue. There is a European scheme for the granting and effect of SPCs and a real danger that the UK could be excluded from that scheme. This could have material adverse consequences for the pharmaceutical sector, though continued membership of the EEA may provide a solution.

There is a considerable demand for cross-border enforcement of rights. If Brexit happens the UK will find itself outside the scope of the Brussels Convention on the Enforcement of Judgments, but, the position may not be too serious as it seems likely that the UK could remain within the scope of the equivalent Lugano Convention which is not restricted to EU members. EEA membership is required for the Lugano terms to apply, and that would involve accepting four key "freedoms" - the movement of goods, capital, services and people.

There is much which remains uncertain, and much which would be subject to terms to be negotiated. EEA membership would be helpful in alleviating the consequences of Brexit, but that may in itself be unacceptable to those seeking withdrawal as it would seem to incorporate all that is unpopular in EU membership, with a total lack of influence. Outside the EEA, the world would be a very uncertain place for the UK in terms of IP protection and enforcement.

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