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# JUDICATURE

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# IP LAW *post-*BREXIT

FOUR EUROPEAN IP EXPERTS ASSESS THE LIKELY IMPACT *of* BREXIT  
*on* INTELLECTUAL PROPERTY RIGHTS *in the* UK AND EU –  
AND WHAT IT ALL MEANS *for the* UNITED STATES

BY RICHARD ARNOLD, LIONEL BENTLY, ESTELLE DERCLAYE, AND GRAEME DINWOODIE



On June 23, 2016, a narrow majority of the British people voted in a referendum to leave the European Union (EU). The referendum did not ask what kind of legal relationship the United Kingdom (UK) should have with the EU after it leaves, and this remains to be negotiated between the UK and the EU. Therefore, it is hard to say what kind of law the UK will have once it has exited the EU and whether it will continue to integrate most, some, or none of the EU law – and it is likely that the full effect of Brexit will not be known for a couple more years.

If, however, the scenario is a so-called ‘hard Brexit’ or ‘clean Brexit’ (which is currently the government’s publicly declared stance), with the UK formally acquiring legislative and judicial autonomy from the EU, the legal landscape could be very different from the current one. It is still possible that in the end the exit is a ‘soft’ one (in which the UK would retain much of the EU’s substantive and procedural law in some form). This piece,

however, envisions the consequences of a hard Brexit on intellectual property rights.<sup>1</sup>

The consequences of a hard Brexit will vary depending on the intellectual property right (IPR) concerned because IPRs have been Europeanized at different speeds, via different instruments, and through different institutions. We will concentrate on the four main IPRs — copyrights, trademarks, designs, and patents — as well as trade secrets, and we will highlight a few salient substantive and procedural issues.

First, EU law — including the Court of Justice of the European Union’s (CJEU) judgments — will apply until the end of the negotiations between the UK and the EU, which will at the latest be March 29, 2019, or two years from the date Prime Minister invoked Article 50 to officially trigger Brexit (unless this period is extended by political agreement).<sup>2</sup>

The two main EU legislative instruments are regulations and directives. Registered IPRs (patents, designs, and trademarks) are legislated both by regulation and by directive, while copyrights have so far only been legislated by directive. An EU directive needs to be implemented into a state’s national law by some

form of legislative act (whether by statutory amendment or delegated legislation, such as a statutory instrument). In contrast, an EU regulation is immediately applicable in the UK without such a process.

Therefore, once the UK leaves the EU at the end of the negotiations, *regulations* will immediately and automatically cease to have effect in the UK. But the national law implementing the *directives* will continue to be in force until amended by statute. Thus, for a while, it appears likely that UK law implementing directives largely will not change, because it will take a considerable time for the UK to revisit the thousands of directives it has implemented into its law over the last 44 years. To be sure, some implementing provisions may have to be altered sooner rather than later, such as those that turn on an act occurring in the European Union or the European Economic Area (EEA) or that refer to “a Member State.”<sup>3</sup> But Brexit’s effect will be far more immediate and drastic in relation to EU regulations.

## TRADEMARK LAW

In the EU, a trader can acquire two types of registered trademark at the state and at the EU level. The latter — so-called EU ▶



**AN EUTM [EU TRADEMARK] IS REVOCABLE IF IT HAS *not* BEEN PUT TO GENUINE USE IN THE UNION IN CONNECTION WITH THE GOODS AND SERVICES FOR WHICH IT IS REGISTERED WITHIN A CONTINUOUS PERIOD OF FIVE YEARS *and* THERE IS NO PROPER REASON FOR THIS NONUSE. WHAT HAPPENS IF A EUTM HOLDER HAS ONLY USED THE MARK IN THE UK?**

trademarks (EUTMs) — are filed at the EU intellectual property office (EUIPO) in Alicante, Spain, and have the same effect in all Member States of the EU. The relevant provision of the EU trademark regulation (EUTMR), 2015/2424 Article 1.2, states:

An EU trade mark shall have a unitary character. It shall have equal effect throughout the Union. It shall not be registered, transferred or surrendered or be the subject of a decision revoking the rights of the proprietor or declaring it invalid, nor shall its use be prohibited, save in respect of the whole Union [ . . . ].

When EU law no longer applies, the status of an EUTM will be unclear. Brexit will affect EUTMs directly because they are governed by an EU regulation. Several problems will arise concerning EUTMs. The first issue concerns the rights of those who hold existing EUTMs, which, post-Brexit, will no longer extend to the UK (because it will no longer be in the Union). There are three basic options to address this lack of UK protection for existing right holders:

1. Do nothing, and allow EUTM owners, including UK and non-UK owners, to lose their trademark rights in the UK (and thus require them to file in the UK, losing their EUTM priority date);
2. Negotiate an arrangement with the EU that enables the UK to remain part of the EUTM system after Brexit and thus extend the geographic scope of the EUTM beyond that of the EU; or
3. Enact national legislation that gives rights in the UK to EUTM owners notwithstanding Brexit.

If one assumes that option 1 is commercially unacceptable and option 2 is not politically feasible, given the absolute nature of the government's position on post-Brexit prescriptive and judicial

authority in the UK, then one is driven to option 3. There are a variety of mechanisms for implementing option 3. The Chartered Institute of Trade Mark Attorneys has identified at least six as follows, inspired by historical precedents:

1. 'Jersey' — Enact legislation enforcing EUTMs in the UK without any amendment of the EUTMR. This is similar to the enforcement of EUTMs in Jersey, which is not a part of the EU, and also resembles mechanisms once deployed by some British colonies to protect their territory designs registered in the UK.
2. 'Montenegro' — Automatically enter all existing EUTMs into the registry of UK Trade Marks (UKTMs) at the time of Brexit. This is similar to the solution adopted when the Montenegrin trademark system separated from the Serbian system.
3. 'Tuvalu' — Recognize the right of EUTM owners to request that existing EUTMs be entered in the UKTM register as equivalent rights. When Tuvalu's trademark system separated from the UK system, a similar approach was followed.
4. 'Veto' — Similar to the Tuvalu option but provides that the UKIPO will examine each request and retain veto power.
5. 'Ireland' — Enforce EUTMs in the UK until the point of renewal, at which time the owner may request that the EUTM be entered in the register of UKTMs. This is similar to the system used when the Irish trademark system separated from the UK system.
6. 'Conversion' — Owners of EUTMs can apply for a new UKTM which will retain the same effective start date as the previous EUTM. The new UKTM will be fully examined

as though a new trademark application. This echoes the present system for converting EUTMs into national trademarks.

There are disadvantages with some of these options. If right holders are forced to apply for the same mark at the UKIPO, this will increase the office's workload considerably and may require additional fees that could seem unfair to right owners. If all (1.2 million active) EUTMs are automatically converted into national UK registrations, this would result in huge clutter and deadwood in the UK trademark register (although EUTMs currently constitute earlier rights for purposes of UK examination). And, almost certainly, any option allowing conversion of EUTMs should require a statement of bona fide intent to use in the UK. This would help limit deadwood in the UK register and ensure that owners of converted marks are not in a better position than existing UK registrants.

A second serious issue is the increased exposure of existing EUTMs to revocation. An EUTM is revocable if it has not been put to genuine use in the Union in connection with the goods and services for which it is registered within a continuous period of five years *and* there is no proper reason for this nonuse. What happens if a EUTM holder has only used the mark in the UK? At present, this may be sufficient to maintain an EUTM (although some UK courts have recently cautioned against assuming this in all cases). Post-Brexit, however, how is use in the UK to be figured into this analysis? Will the EUTM become vulnerable to revocation because use in the UK will no longer be "use in the Union?" What weight will be given to pre-Brexit use in the UK in a post-Brexit, EU-based assessment of genuine use?

These types of uncertainties will be most acute for UK-based EUTM owners, who are most likely to fit the profile of operating

first in the UK with a view to future expansion on the continent. Therefore, it would serve their interests if there was a transitional period (beyond the already-existing five years from registration) to enable UK EUTM holders to maintain the EUTM by making some use in the (UK-less) EU. Of course, owners from other Member States who have used their EUTMs only in their home country but not in the UK will have to make reciprocal plans to retain protection in the UK. That problem is, to some extent, encompassed within the first issue discussed above.

These problems for existing EUTM owners will inevitably require political intervention. But some mark owners can engage in self-help in advance of Brexit and thus protect themselves from the risk of political whim. UK owners of an EUTM fearing revocation will no doubt consider making use in the other parts of the EU during the two-year period following the filing of the Article 50 declaration; although this might require additional expense and adjustment of existing commercial strategy, it may be sufficient to retain EUTM rights and preserve existing priorities. However, the owner of an EUTM seeking to retain equivalent protection without any diminution of rights in the UK will need political help; simply making new UK filings in advance of Brexit would not (absent legislation) preserve in the UK the priority of rights granted by the EUTM. A fair approach would surely seek to accommodate both groups of mark owners equally, though the raw political bargaining that might ensue over the next two years may well be informed by the extent to which these risks are equally shared by the UK and non-UK rights owners.

A third issue is the fate of the pending EUTM applications. The rights of those applicants will need to be protected; the likely mechanisms here would again build upon the six solutions to the problem concerning the rights of those who hold existing EUTMs, as any registrations emanating from such applications will have five years before being subject to revocation for nonuse in the EU.

If U.S. businesses were securing protection in Europe through the filing of national marks prior to Brexit, nothing will change immediately after the UK effectively leaves the EU. However, U.S. applicants are among the heaviest users of EUTMs. Procedurally, post-Brexit, U.S. businesses wishing to be protected across the EU and in the UK will have to file at least two trademark applications for the same mark, one at EUIPO, the other at UKIPO; at present, they can secure that protection with a single filing at EUIPO. Indeed, in the immediate wake of the Brexit referendum, some large U.S. companies have already refiled for UK marks, apparently not waiting for reforms that might preserve their priority.

## DESIGNS

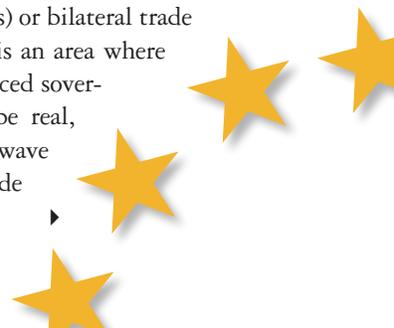
As design rights can also be obtained at EU level — the so-called Community registered design right (CRDR) and Community unregistered design right (CUDR)<sup>4</sup> — the problems discussed above regarding the scope of protection for EUTMs will be similar (though not identical) for EU designs: Protection in the UK will no longer flow from the ownership of an EU right, and thus some form of mechanism to convert “EU28” rights — IP rights recognized in all 28 EU Member States — to “EU27+UK” rights will be required, at least for CRDRs. (The unregistered nature of the CUDR makes some of the models being considered for trademarks inapplicable; the short duration of the CUDR might counsel in favor of the Jersey model for three years).

Moreover, because there is a greater concordance between the relevant prior rights for UK and EU design applications than between UK and EU trademark applications, there has been a more substantial dropoff in national design registrations since the EU system was established. Because a far greater proportion of design rights are now pursued at the EU rather than UK level, the scope-of-protection problem may be more acute in some respects. In contrast, as designs are not subject to revocation for nonuse, that problem is trademark-specific.

Whatever the transitional measure, if Brexit implies no longer applying EU law, there are some positive consequences in relation to design rights in the UK. First, the CUDR and CRDR will disappear from the legal landscape, and it will no longer be possible to cumulate a national and an EU design right, which was an unnecessary overlap that the European Commission did not want when it proposed EU design rights.

The disappearance of the CUDR will not be catastrophic; it is generally of little significance in the UK anyway, given that the UK also offered its own, lengthier, unregistered design right (UKUDR). Even if, unlike the CUDR, the UKUDR does not protect surface decoration or color, copyright can often come to the rescue for some of that subject matter, mainly original two-dimensional designs. Still, the provisions of UKUDR and CUDR are not the same; UKUDR’s excluded subject matter, protection requirements, and infringement test are different. So while the UKUDR will fill the gap to a large extent, some of the positive aspects of the CUDR will be lost unless UK law is changed.

As with other directives, the UK will formally have more autonomy with its Registered Designs Act, though this also will require legislative intervention in what will be a crowded parliamentary schedule. Will it keep the provisions incorporated from the Designs Directive, 1998/71, which substantially liberalized registrability? Or will it return to the rules applicable to designs filed prior to 2001 (when the UK implemented that directive)? Or might the UK do something completely different with UK-registered designs (UKRDR)? Reform of design law is in the air in many parts of the world. Few design constraints are imposed at the global level via the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) or bilateral trade agreements; it is an area where claims of enhanced sovereignty might be real, even after the wave of promised trade agreements.



For U.S. businesses, these changes may not make much difference — except when it comes to unregistered design protection. Since the CUDR will no longer be applicable in the UK, the only automatic protection will arise via the UKUDR. Some U.S. designers and proprietors may be prejudiced by this change. Under current law, to benefit from the CUDR, the design must first be disclosed in the EU. However, for the UKUDR, the eligibility requirements are more stringent. Protection requires a ‘qualifying person’; effectively, this means an individual habitually resident in the UK or a legal entity formed under the law of a part of the UK with a local place of business where substantial business is conducted. Thus, U.S. businesses may feel compelled either to register their designs or organize their business in the UK.

## PATENTS

The implications of Brexit in the field of patents are less dramatic, because there is very little substantive EU patent law. The core of the patent system operating in EU Member States is a creature of an international convention — the 1973 European Patent Convention (EPC), as revised in 2000 — rather than of EU law. The EPC has ten adhering states that are not Member States (as well as two extension states and two validation states). Leaving the EU does not require the UK to leave the EPC, and there has been no suggestion that it should do so.

However, Brexit does raise significant problems with respect to an ambitious procedural innovation that is intended to simplify and reduce the costs of patent enforcement. For decades, the EU has been

trying to establish a unitary EU patent that would allow enforcement throughout the EU. The unitary patent, if it eventually comes into effect, will allow the right holder to enforce a single patent throughout participating EU states through a single patent court (the UPC) established by an international agreement (rather than EU legislation). In order to comply with a critical judgment of the CJEU regarding a prior proposal for reforming European patent litigation, the UPC is to be understood as “a court common to the participating Member States and part of their judicial system”; the UPC has an obligation to refer to the CJEU the supposedly few questions of EU law that will arise.

If the UK government adheres to its political position that the UK will not in any way be subject to EU law and the CJEU, then Brexit will likely exclude the UK from that scheme. More significantly, the agreement establishing the system requires ratification by 13 Member States plus France, Germany, and the UK, and one of the central divisions was going to be based in London. Because the UK has such an integral role in the system’s development and implementation, it seems that its withdrawal from the EU could negate the entire system. However, at the end of November 2016, the UK confirmed it will ratify the unified patent court agreement. So, at least for now, the new system is apparently saved (though to what real effect is not entirely clear).

The situation will have little impact for U.S.-based patent holders, both with regard to procedure and substance. U.S. applicants will continue filing UK patents or European patents, designating the UK as the country where the patent is sought,

as they did in the past. For the most part, the substantive law will not change either, as it is harmonized by the European Patent Convention, which is not part of EU law and is unlikely to change in the near future.

## TRADE SECRETS

At present, trade secrets law in the EU is not harmonized, and there are differences in both the substantive laws and in the procedures adopted by national courts. The 2016 Trade Secrets Directive (TSD) is designed to remedy this. Article 19(1) of that directive requires Member States to transpose it into their national laws by June 9, 2018, which is likely to be at least nine months before Brexit is complete. Given the government’s stated policy of complying with the UK’s obligations so long as it remains a Member State, the UK may be expected to implement the directive.

How much the directive requires UK law change is debatable. In many respects, it is possible to argue that much of UK law already complies with the directive. But it is difficult to argue that UK law is fully compliant in all respects. Presumably, therefore, the government will proceed to implement at least part of the directive.

However, some of the provisions of the directive are not entirely clear, and guidance from the CJEU as to their interpretation will undoubtedly be required. For example, Article 2(4) of the TSD defines “infringing goods” as “goods the design, characteristics, functioning, production process or marketing of which significantly benefits from trade secrets unlawfully acquired, used or disclosed.” This gives rise to at least two difficult questions. First, what is the test of significance for this purpose? Secondly, what is



**FOR THE [UK UNREGISTERED DESIGN RIGHT], THE ELIGIBILITY REQUIREMENTS ARE *more* STRINGENT. PROTECTION REQUIRES A ‘QUALIFYING PERSON’; EFFECTIVELY, THIS MEANS AN INDIVIDUAL HABITUALLY RESIDENT IN THE UK OR A LEGAL ENTITY FORMED UNDER THE LAW OF A PART OF THE UK WITH A LOCAL PLACE OF BUSINESS WHERE SUBSTANTIAL BUSINESS IS CONDUCTED. **THUS, U.S. BUSINESSES MAY FEEL COMPELLED *either* TO REGISTER THEIR DESIGNS OR ORGANIZE THEIR BUSINESS IN THE UK.****

the applicable law by which one determines whether the trade secrets have been “unlawfully” acquired, used, or disclosed, particularly if the goods emanate from outside the EU?

## COPYRIGHT

Copyright law is harmonized in the EU by no fewer than nine directives, with two more in the offing. There are also three related regulations — the so-called “copyright package” (see below in “new directives and regulations”).<sup>5</sup> EU copyright harmonization is the most partial compared to the other IPRs. However, since copyright has been harmonized by directives, those directives have been implemented in the Copyright, Designs and Patents Act (CDPA) and related legislation. Thus, for the most part, the implementation will remain in place after Brexit, and it will take time to modify the law and eliminate aspects the UK does not want to keep.

That said, there are numerous references to “Member States,” “another EEA state,” and so on that will render some of the existing implementing provisions meaningless or perverse. The most obvious example relates to the UK’s transposition of the Orphan Works Directive, 2012/28/EU in Schedule ZA1 of the CDPA: The system for designating the orphan status of a work requires a prior diligent search in the “Member State” in which the work was first published, provides for mutual recognition of orphans from “another Member State,” and mandates notification of the search to the EUIPO. Presumably, British bodies — most notably the British Library and British Film Institute, which have conducted diligent searches before Brexit and entered details of numerous orphan works in the database kept by EUIPO — will be permitted to continue to benefit from the exception under CDPA § 44B (though “reventant” right holders may face difficulties re-establishing their post-Brexit rights through the EUIPO). However, an amendment might be required for the arrangements to continue to make sense for those conducting searches after

Brexit, and, in the absence of some sort of transitional arrangements with the EU, the system of “mutual recognition” will presumably cease to operate. It is an open question how much of the system will be worth maintaining, given the UK’s own orphan works licensing regime, operated under CDPA § 116A and SI 2014/2863. Brexit will, at least, remove doubts that some had expressed over the compatibility of the UK regime with EU law.

In the medium term, the UK will be able to consider modifying aspects of its copyright regime that were previously harmonized at the EU level — subject, of course, to compliance with global standards found in the TRIPS, Berne, and Rome conventions, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. It will, for instance, be liberated from the exhaustive list of exceptions set out in the *acquis* and thus be able to adopt a fair-use exception modelled on the U.S.’s copyright act. The UK will also be able to reinstate section 52 of its Copyright, Designs and Patents Act. That provision organized (in an effective, albeit complex, legislative scheme) the overlap between registered design rights and copyright; section 52 reduced the copyright’s term to 25 years from first marketing of more than 50 articles embodying the designs, thus almost matching the maximum term of protection for a registered right. The UK government decided to repeal that provision in view of its reading of the CJEU in *Flos* (Case C-168/09).

On the other hand, the UK may well decide not to reinstate section 52 if it believes that section 52 offered designers insufficient protection. It might also have to face difficult questions concerning its ability to curtail property rights under Article 1 of the First Protocol to the European Convention on Human Rights (ECHR), as the current government policy is presently to maintain the UK’s membership of this treaty arrangement. The UK would also be free to repeal the *droit de suite*, though, again, difficulties might be faced with respect to the ECHR.

If the UK starts to unravel the copyright EU *acquis*, it would be well-advised

to totally revamp its copyright act, which has become over-long and over-complicated — and not only because of the implementation of EU directives. If the UK wishes to “take back control” of its copyright law, then a thorough review and overhaul of the 1988 Act will be required. Thus, Brexit is liable to make the need for a new act more pressing, not less. However, as a practical matter, it is unlikely that copyright reform will occur quickly after Brexit, simply because the government will likely focus on more pressing political issues. Given the repeated consultations and changes in copyright law over the last dozen years, it is possible that a quiet period may be thought appropriate.

As for copyright in the remaining 27 Member States of the EU — on the assumption that the Union survives — it seems possible that the harmonization agenda might be extended to encompass issues previously regarded as too sensitive to touch, such as an author’s moral rights and author-protective contract rules. Previously, it had been assumed that the UK would accept only a highly diluted version of moral rights and would block any proposal to regulate author-publisher contracts. Indeed, in September 2016, even before the UK triggered Article 50, the European Commission proposed the enactment of a “contract adjustment mechanism” applicable if the remuneration authors or performers receive under an exploitation contract turns out to be “disproportionately low” compared with the revenues derived from the exploitation of the work or performance.<sup>6</sup> The withdrawal of the UK from the EU project also makes the unification of copyright via regulation more feasible, as the range of different national copyright positions shrinks. Because most countries in the world are parties to the Berne Convention, copyright is acquired without the need for formalities in the U.S., UK, and the EU, and that will not change post-Brexit. ▶

## OTHER IPRS

Other IPRs that will be immediately affected by Brexit are those legislated by regulation. The most important of these include the Community plant variety right (Regulation 2001/94), Protected Designations of Origin (PDOs) and Protected Geographical Indications (PGIs) (Regulation 1151/2012), supplementary protection certificates for medicinal products and plant protection products (Regulations 469/2009 and 1610/96), and the Customs Regulation (Regulation 608/2013). Other IPRs legislated by directives, such as those dealing with the protection of databases (Directive 96/9) and topographies of semi-conductor chips (Directive 87/45), as well as the Enforcement Directive (Directive 2004/48), will not directly cease to have effect because they are part of national law.

## NEW DIRECTIVES AND REGULATIONS

Regulations that go into effect during the negotiations following the triggering of Article 50 will continue to apply in the UK until Brexit is complete. Moreover, the UK government has suggested that recent directives that must be implemented by the Brexit date also will be transposed into UK law. This will include the 2015 Trade Mark Directive, which has to be implemented by Jan. 14, 2019, and the 2016 Trade Secrets Directive (reviewed above), which is to be implemented by June 9, 2018. But as the gap between Brexit and an implementation date closes, the government may decide simply not to implement — rather than implement and amend — if it has concerns about the EU law. Thus, although the 2015 trademark reforms as a whole are likely to be adopted, there may be pressure to resist particular changes, such as the contraction of the own-name defense (which the UK courts have handled adeptly as it currently stands) and, more controversially, the in-transit infringement provi-

sion, which could plausibly be part of a government plan to create a UK economic climate sufficiently different from the EU to stimulate business. However, since the outcome of the negotiations is uncertain and a softer type of Brexit has not been ruled out, the government may decide to amend the UK Trade Mark Act 1994 in anticipation of having to comply with the 2015 Directive, especially if the government thinks that the changes are useful regardless of the basis on which Brexit occurs.

It is also possible that the UK may be obliged to implement EU norms that have not, as yet, been agreed to at the EU level. The most prominent of these is the EU “copyright package,” a series of directives and regulations recently proposed by the European Commission.<sup>7</sup> Because many of the provisions are controversial, it is too early to predict when the legislative process might be concluded. Once the package is adopted, current indications suggest a 12-month transposition period, in which case it is not inconceivable that the UK might, in principle, be obliged to implement the legislation.

Two components of the package relate to the 2013 Marrakesh Treaty on Visually Impaired Persons. If the implementing legislation for the treaty is adopted by the EU legislature before the UK withdraws, there might be domestic advantages in the UK transposing the EU legislation rather than, post-Brexit, preparing its own legislation with a view to ratifying the treaty as an independent state.

In terms of substantive law, UK trademark, design, and copyright law may change and possibly diverge from current EU law once the UK has left the EU, though we note above the extent to which that is both possible and likely. If it does, U.S. businesses operating in Europe may be subject to two different laws instead of one in relation to issues which were harmonized prior to Brexit. On non-harmonized issues, things will stay the same, unless new integration or harmonization occurs (as should be the case with the forthcoming adoption of the copyright package).

## CJEU CASE LAW

Following Brexit, UK courts will no longer be able to refer questions to the CJEU for clarification of law that has its roots in EU legislation. British judges were quite active on this front and their references often provided welcome clarifications that benefited all 28 Member States. This ability to refer questions would not matter if the UK were to revise its IP laws so that they no longer resemble the directives. In that case, the case law of the CJEU would become largely irrelevant.

The government’s white paper “Legislating for the United Kingdom’s withdrawal from the European Union” states that CJEU cases decided until the date the UK formally exits the EU will have the status of UK Supreme Court case law post-exit, meaning that the Supreme Court will be able to depart from CJEU precedents on the same basis that it departs from its own.<sup>8</sup> This means that pre-Brexit CJEU case law will continue to be binding unless and until there is either a legislative change or a Supreme Court decision to the contrary. Although the white paper says nothing about the status of CJEU cases decided after exit, it is implicit that these will not be binding even if they concern directives that the UK has implemented.

In areas where the UK does not unravel the *acquis*, however, the case law of the CJEU will remain persuasive. For example, the UK will probably keep the parody exception introduced into its copyright law in 2014 (CDPA § 30A) as a result of a purely national initiative. But as the text of the exception is almost identical to the EU directive authorizing such exceptions, the CJEU’s *Deckmyn* decision (Case C-201/13) will remain binding unless the Supreme Court departs from it and future CJEU decisions on parody will still be persuasive. On the other hand, a probable consequence of Brexit is that the UK will continue to have a closed list of copyright works rather than an open one (some CJEU decisions had made it arguable that a closed list was incompatible with EU law, even if they had not formally addressed the question). For some deci-

sions, this analysis might be affected by the extent to which those decisions flow from the EU Charter of Fundamental Rights; the continued relevance of such charter-driven decisions may turn upon the existence of parallel provisions in the ECHR, to which the UK, at least for now, remains a party.

It remains to be seen how prepared the Supreme Court will be to depart from CJEU precedents if legislation is unchanged. For example, it is possible that the Supreme Court would take the opportunity to depart from the 2009 Infopaq decision (Case C-5/08), which requires that the test of originality be the same for all works and not just for photographs, databases, and computer programs, as the text of the directives provided. However, Infopaq has to some extent been embedded in UK law through domestic jurisprudence in the UK appellate courts. Moreover, originality is not defined in the UK Act, and it may be that the UK carries on following the EU concept of the “author’s own intellectual creation” rather than the old “skill, labour and judgment” standard, as the Canadians

and Americans did when they departed from the UK criterion.

## REPRESENTATIVES

Another significant concern is the status of UK representatives, mainly lawyers and trademark agents who appear before the EUIPO, the General Court, and the CJEU. Those representatives must be legal practitioners qualified in one of the Member States of the EEA and must have their place of business within the EEA. In case of a hard Brexit, the UK also is likely to leave the EEA and, unless an agreement is found to retain these rights, these legal representatives will lose a big part of their business.

## CONCLUSION

This short overview of some of the most important implications of Brexit for intellectual property law highlights many uncertainties for the rights of both UK and EU citizens and companies, as well as non-EU citizens and businesses who do business in the UK. Despite the uncertainty, it seems safe to say that not much will happen very soon. Transitional periods and arrangements are necessary to safe-

guard many of the rights acquired prior to the date of Brexit. And, the EU IP *acquis* that has become embodied in national law likely will take a long time to disappear, simply because of the amount of EU law in all areas, not just those relating to IP, that the UK Parliament will have to discuss and amend in the coming years. —★



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<sup>1</sup> A hard Brexit in which the UK strikes a deal with the EU through a free trade agreement (FTA) may well resemble a soft Brexit. In such circumstances, the UK may have to comply with some of the current EU *acquis* since every EU FTA with the rest of world comes with a detailed IP chapter obliging the other party to comply with some features of EU law. Indeed, the UK might, in effect, have to comply with some of the EU *acquis* even if it secures trade agreements only with third parties (e.g., New Zealand, Australia, or South Africa) beyond the EU. These third countries are often themselves bound by bilateral agreements with the EU (or with countries that have made deals with the EU) such that the network of bilateral and multilateral obligations in the field is substantially framed by a loose amalgam of much EU and U.S. law.

<sup>2</sup> *Full Text of the Article 50 Letter*, THE GUARDIAN (Mar. 29, 2017), <https://www.theguardian.com/politics/blog/live/2017/mar/29/brexit-theresa-may-triggers-article-50-politics-live?page=with:block-58dba1bae4b0a411e9ab99cf#block-58dba1bae4b0a411e9ab99cf>.

<sup>3</sup> See, e.g., Copyright, Designs and Patents Act (CDPA) 1988, c. 48, § 18(3) (UK), <http://www.legislation.gov.uk/ukpga/1988/48/contents>; Trade Marks Act 1994, c. 26, § 12 (UK), <http://www.legislation.gov.uk/ukpga/1994/26/contents> (exhaustion tied to putting goods on the market in the EEA). Cf., CDPA

§ 27(5) (secondary infringement by importing copyrighted goods regulated by reference to European Communities Act 1972, which it is assumed will be repealed).

<sup>4</sup> The main difference between a Community registered and Community unregistered design right is that the latter is not registered. The other main difference is the term, a CUDR lasts only 3 years while a CRDR lasts up to 25 years. Otherwise, the substantive law governing both CUDR and CRDR is identical. Procedural rules are slightly different.

<sup>5</sup> Commission Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, COM (2016) 593 final (Sept. 14, 2016); Proposal for a Regulation of the European Parliament and of the Council Laying Down Rules on the Exercise of Copyright and Related Rights Applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Programmes, COM (2016) 594 final (Sept. 14, 2016); Proposal for a Directive of the European Parliament and of the Council on Certain Permitted Uses of Works and Other Subject-matter Protected by Copyright and Related Rights for the Benefit of Persons who are Blind, Visually Impaired or Otherwise Print Disabled and Amending Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and

Related Rights in the Information Society, COM (2016) 596 final (Sept. 14, 2016); Proposal for a Regulation of the European Parliament and of the Council on the Cross-border Exchange between the Union and Third Countries of Accessible Format Copies of Certain Works and Other Subject-matter Protected by Copyright and Related Rights for the Benefit of Persons who are Blind, Visually Impaired or Otherwise Print Disabled, COM (2016) 595 final (Sept. 14, 2016). See also Proposal for a Regulation of the European Parliament and of the Council on Addressing Geo-blocking and Other Forms of Discrimination Based on Customers’ Nationality, Place of Residence or Place of Establishment within the Internal Market and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, COM (2016) 289 final (May 25, 2016).

<sup>6</sup> Commission Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, Art. 15, COM (2016) 593 final (Sept. 14, 2016).

<sup>7</sup> *Supra* n. 5.

<sup>8</sup> Legislating for the United Kingdom’s withdrawal from the European Union, (Mar. 30, 2017), <https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union>.