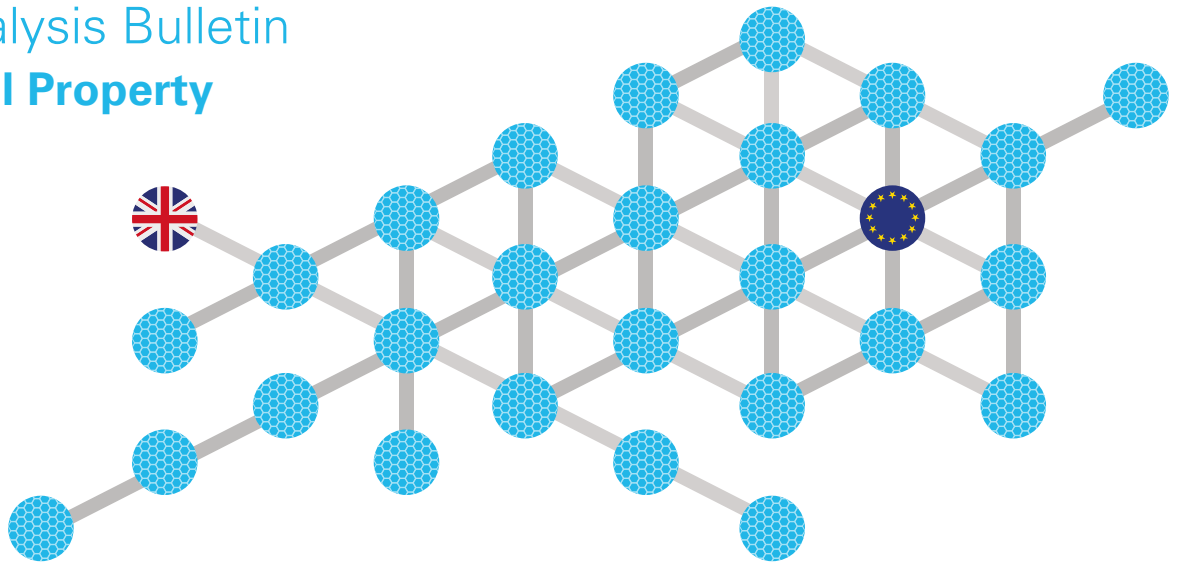


Brexit Analysis Bulletin

Intellectual Property



At present, the UK intellectual property system is closely integrated with the EU. Whilst the UK has a system of administering national intellectual property rights through the UK Intellectual Property Office (covering patents, trade marks and registered designs), EU-wide mechanisms such as Community Trade Marks and Community Registered Designs are well established in the IP portfolios of UK businesses. It is therefore important to be aware of what a Brexit may mean in respect of your intellectual property portfolio.

Trade Marks and Registered Designs

At present, UK entities have a choice when registering trade marks or registered designs. They can obtain national rights through registering with the UK Intellectual Property Office and they can separately obtain EU-wide rights through registering with the Office for Harmonization in the Internal Market for a Community Trade Mark or Community Registered Design. Many businesses opt for the EU method as it is a cost-effective means of obtaining protection both in the UK and in the European market.

If the UK were to leave the EU, discussions would be required as to what happens to these Community protections and to what level they remain effective. It is likely that the UK would simply drop out of the list of territories protected by these devices. This could leave the validity of the registration vulnerable, especially in circumstances where use in the UK constituted the main body of proof for use in the EU. In any event, it is likely that the UK Government would need to either legislate for successor rights – perhaps through the conversion of the Community registration into UK law - or else UK businesses will be asked to separately register via the UK Intellectual Property Office and incur the resultant costs. Any successor rights may have implications for existing intellectual property licences, security over intellectual property and the enforcement of judgments and injunctions in intellectual property proceedings.

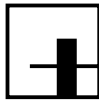
Copyright

Copyright is essentially a territorial matter – albeit that its development has been influenced by EU law such as the Copyright Directive, together with a number of international conventions that will not be affected in the event of a Brexit. Therefore, unless the UK decided to repeal existing domestic legislation, if the UK were to leave the EU this would be unlikely to have much of an effect on UK businesses. The UK could simply retain the legislation currently in place. The key difference would be that over time there may be a divergence between UK copyright law and EU copyright law, especially in respect of any judgments issued by the respective courts.

Patents

Brexit would have limited effect on existing patents or their effectiveness in the UK. This is because the European Patent Office (EPO) is not an EU institution but rather the result of the European Patent Convention. The EPO creates a single patent grant procedure, not a single patent from an enforcement perspective. Effectively, once a patent is granted by the EPO it is converted into a bundle of national patents. Therefore, a patent granted by the EPO that is effective in the UK is essentially equivalent to a national UK patent. This would continue to be the case following any Brexit.

The position is not so clear-cut in respect of the proposed EU Unitary Patent, which proposes to implement a single



EU-wide patent. This has been in development for a number of years and the intention was for it to finally be ratified during the course of this year. If the Unitary Patent were ratified prior to an 'out' vote, then, in a similar manner to Community Trade Marks and Registered Designs, it is difficult to see how the Unitary Patent could have effect in the UK. Practically speaking, given the short time-scale there would be between any ratification and the referendum result and implementation, any period of uncertainty should be relatively short in the event of a Brexit.

Whilst the position of both the UK Government and the EU is that the referendum and the result shall have no effect on the progression of the Unitary Patent, if the Unitary Patent were not ratified prior to an 'out' vote then it is possible that a Brexit would cause further delay to the implementation of the Unitary Patent, especially as ratification by the UK is a pre-condition of the current agreement in place.

Potential Alternatives for the UK

Of course, the true impact of any Brexit on intellectual property protections would be determined by the status of the UK on exit. We have briefly considered the Norwegian model and World Trade Organisation model below.

Norwegian-Style EEA Membership

If the Norwegian model were to be adopted, the UK would remain a member of the European Economic Area (EEA), which is largely governed by the same basic free movement rules. This would mean that:

- national rights influenced by EU directives would continue and likely remain aligned with EU law since the majority of such directives also apply to the EEA;

- EU-wide devices such as the Community Trade Mark would no longer apply to the UK;
- the UK would continue to participate in the European Patent Office, although there may be delays to the new unitary patent system;
- and UK courts would still need to interpret intellectual property law in light of EU rules.

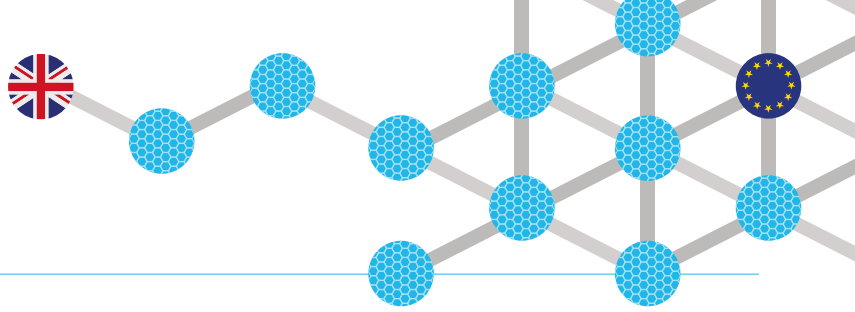
World Trade Organisation (WTO) Model

If the WTO model were to be adopted, the UK would need to negotiate new trade agreements with the EU. This would mean that: whilst existing national rights influenced by EU directives would continue unless repealed the UK would not be bound to implement any future changes; EU-wide devices such as the Community Trade Mark would no longer apply to the UK; the UK would continue to participate in the European Patent Office, although there may be delays to the new unitary patent system; and UK courts would not need to interpret intellectual property law in light of EU rules.

Therefore, the key differences between the models would surround the future development of intellectual property rights and the role of the EU courts.

Concluding remarks

It therefore appears that the key issue which may confront UK businesses in the event of a Brexit is the continuing validity of Community Trade Marks and Registered Designs, particularly where no corresponding UK trade mark/registered design protections are in place. This may result in increased costs for UK businesses – especially those with large intellectual property portfolios – as they register their IP with the UK Intellectual Property Office. The UK's exclusion from the EU Unitary Patent could also impact on some businesses' future planning.



SHEPHERD AND WEDDERBURN'S BREXIT ADVISERS JOINING THE DOTS OF THE EU REFERENDUM

What If?

Shepherd and Wedderburn has been for many years offering balanced and impartial advice on how the different scenarios might play out in the event of constitutional change.

With the EU referendum now only months away, members of our dedicated Brexit Advisers will continue to interrogate the 'what if' questions, relating to specific sectors, that will emerge when the UK decides whether to remain in or leave the EU.

For further information in the first instance, please contact:

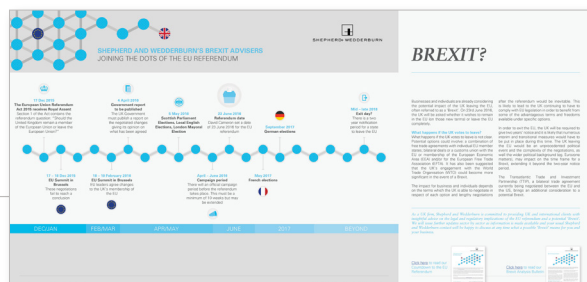


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