

**JUST KEEP CALM & CARRY ON:
THE IMPACT OF BREXIT ON INTELLECTUAL PROPERTY LAWS IN BRITAIN AND
THE EUROPEAN UNION**

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Britain's decision to "Brexit" from the European Union ("EU") has generated great uncertainty about what will happen to existing and future intellectual property laws and interests.

This Article examines the effects that Brexit seems likely to have upon copyright, patent, trademark and design law in Britain and the EU. It outlines the current frameworks in operation in each of these areas, and discusses how these might be developed in response to Britain's departure from the EU. Brexit's prospective impacts on plant variety rights, geographical indications, semiconductor topographies, trade secrets, and intellectual property practice issues in the EU and Britain are also considered.

The Article concludes that, from an intellectual property perspective, the economic interests of both Britain and the rest of the EU are likely to be best served in the mid- to longer-term by taking a "soft Brexit" approach to intellectual property laws. Avoiding rhetorical posturing or retaliation for perceived slights seems, ultimately, likely to produce the best intellectual property-related consequences for both parties.

Britain and the EU both stand to damage their commercial environments if their intellectual property arrangements are dramatically altered as a result of Brexit. By contrast, if Britain maintains many existing single market arrangements with respect to intellectual property law – even at the cost of reducing the policy-making freedom that it would enjoy under a "hard(er) Brexit" – the result may be mutually beneficial interdependence. This would arguably produce the best commercial outcomes for the EU and Britain alike.

I. INTRODUCTION

In June 2016, a majority of the British¹ people voted to “Brexit” out of the European Union (“EU”). The outcome was a surprise to many and, as post-Brexit arrangements between Britain and the EU had not been determined in advance, it unleashed immediate concern about the implications for intellectual property law and assets.

The ramifications for intellectual property will depend upon the administrative arrangements agreed between Britain and the EU during pre-Brexit negotiations from 2017-2019, and any trade or other agreements concluded after Brexit takes effect.

The march towards Brexit formally commenced on 29 March 2017,² when Britain notified the European Council (“Council”) that it intended to withdraw from the EU. This triggered Article 50 of the Treaty of Lisbon³ – which states that any Member State may decide to withdraw from the EU – and marked the commencement of negotiations about future arrangements between Britain and the EU. The separation process should occur within two years⁴ and be finalized by mid-2019.

This Article identifies the effects that Brexit is likely to have upon different types of intellectual property interests in Britain and the EU. To examine these issues, this Article considers Brexit’s potential impact on copyright, patent, trademark and design law. The Article outlines the current frameworks in operation in each of these areas, and speculates as to how these might be developed in response to Brexit. The effect of Brexit on plant variety rights, geographical indications, semiconductor topographies, trade secrets, and practice issues are also surveyed.

The Article concludes that, from an intellectual property perspective, the mid- to longer-term economic interests of both Britain and the rest of the EU are likely to be best served by keeping calm, avoiding rhetorical posturing, and taking a “soft Brexit” approach to intellectual property laws. This would entail maintaining in Britain many existing single

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¹ For the purposes of this Article, the names Britain and the United Kingdom (UK) are used interchangeably to refer to the jurisdiction officially known as the United Kingdom of Great Britain and Northern Ireland.

² On 24 January 2017, the Supreme Court of the United Kingdom ruled that the government must seek parliamentary approval before triggering Article 50: *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5. This approval was obtained when the *European Union (Notification of Withdrawal) Bill* passed through Parliament on 13 March 2017, becoming law.

³ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007 O.J. C 306/1 [hereinafter Treaty of Lisbon].

⁴ *Id.*

market arrangements with respect to intellectual property law, even at the cost of reducing the policy-making freedom that Britain would enjoy under a “hard(er) Brexit”. Obversely, both Britain and the EU stand to damage their commercial environments if their intellectual property arrangements are dramatically altered as a result of Brexit.

II. NEGOTIATING BREXIT

The specific changes that Brexit will bring to the substance and application of intellectual property laws will depend greatly on the nature of the arrangements that are put in place after the negotiating period concludes.

Upon Brexit, aspects of intellectual property law based on existing or future EU Regulations will cease to apply in Britain unless Westminster legislates to incorporate them directly into domestic law. The British Government has indicated a “Great Repeal Bill” will be used to transpose existing EU law into British legislation, which can then be amended, repealed or improved on a provision-by-provision basis.⁵ However, further measures are still likely to be necessary to make EU-derived intellectual property laws operate smoothly in a post-Brexit Britain, particularly where they refer to EU institutions that will no longer have jurisdiction in Britain. Those measures will be heavily influenced by whatever post-Brexit arrangements are put in place between Britain and the EU.

If the negotiators conclude a soft Brexit in which Britain remains within the European Economic Area (“EEA”) and/or European Free Trade Association (“EFTA”), it can be expected that relatively little will change in practice. However, a harder break from the existing system could result in very significant differences in the ways rights holders could protect various types of intellectual property across Europe. While such changes would mainly affect the protection of intellectual property within Britain, some impact is also likely to be felt in the remaining EU Member States.

⁵ All EU Member States are required to comply with EU laws known as Regulations and Directives, the effect of which is to “harmonize” their national laws. EU Regulations are legally enforceable in all Member States upon their commencement, and they override any inconsistent pre-existing domestic laws. By contrast, Directives are binding and set out objectives that Member States must implement by way of their domestic legislation, though individual states are allowed flexibility as to how the objectives will be achieved.

These will no longer apply in Britain post-Brexit, unless they have been transposed into British law. Hence, the Great Repeal Bill has been proposed. See Department for Exiting the European Union, *Legislating for the United Kingdom’s Withdrawal from the European Union* (Great Repeal Bill White Paper), 30 March 2017, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf. The Great Repeal Bill White Paper sets out general principles but it lacks detail and does not specifically mention intellectual property law. It therefore remains unknown at the time of writing how, for example, Britain intends to transpose and/or amend laws referring to EU institutions such as the EUIPO. This may become clearer when the draft text of the Great Repeal Bill is released.

For rights holders, the major effect of a hard Brexit is likely to be the inconvenience and cost of having to register trademarks, designs and patents twice (i.e. separately in Britain and the EU) to maintain the level of protection that could have been achieved with a single EU-wide registration but for Brexit. Likewise, commercial application of intellectual property law (e.g. through licensing agreements) is likely to be affected by Brexit, as is enforcement of intellectual property rights.

Basing the analysis on the default position of a hard Brexit – but always allowing for the possibility of an agreement between Britain and the EU that could allow for a softer Brexit – this Article explains relevant points about the way intellectual property laws currently function in the EU, and discusses how they could be affected or reformulated in a post-Brexit EU and Britain. It is entirely possible that a hard(er) Brexit could be negotiated with respect to some areas of intellectual property (e.g. copyright), while a softer approach is taken in other areas (e.g. trademarks and/or patents).

While the British government has sought to reassure interested parties,⁶ uncertainty about these issues seems likely to persist for some time as the intricacy of the EU intellectual property *acquis* means that post-Brexit arrangements could take quite a while to resolve. The following discussion casts light on the various intellectual property options and outcomes that Brexit could produce.

III. COPYRIGHT

Brexit seems unlikely to have a significant immediate effect on British copyright law as many EU copyright principles have already been incorporated into British domestic copyright law, and many fundamental principles are governed by international treaties.

While extensive in some respects, the harmonization of European copyright law has been piecemeal and partial. The European harmonization agenda with respect to copyright has been described as “ambitious”,⁷ yet copyright law remains the subject of domestic laws with distinct variations across the EU. For this reason, copyright may well be the area of intellectual property law that is the least affected by Brexit.

Copyright laws offer time-limited rights to the owners of certain creative output. Literary, dramatic, musical and artistic works are protected, as are related materials such as sound and video recordings, broadcasts and published editions. All EU Member States – including Britain – are individually members of the Berne Convention⁸ and the World

⁶ INTELLECTUAL PROPERTY OFFICE, IP AND BREXIT: THE FACTS (2016), available at <https://www.gov.uk/government/news/ip-and-brexit-the-facts>.

⁷ P. Bernt Hugenholtz, *Harmonisation or Unification of European Union Copyright Law*, 38 MONASH UNIVERSITY L. REV. 4-16, 4 (2012).

⁸ The Berne Convention for the Protection of Literary and Artistic Works, 9 Sept. 1886.

Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"),⁹ which set out basic standards and principles for subsistence of copyright works. All must, therefore, host copyright laws that conform to the requirements of those treaties, and all must offer protection under domestic copyright laws to the nationals of other treaty partners. This principle will ensure continuity of basic copyright protection for nationals of the EU and Britain despite Brexit.

While each EU Member State must also implement the principles of the EU's copyright *acquis* (thus placing a heavy burden on Member States' legislative apparatus),¹⁰ no comprehensive EU-wide copyright law exists and the requirements for copyright protection have not been harmonized. As no copyright directive establishes the essential elements of copyright law across the EU, the ways in which copyright principles mandated by the Berne Convention and TRIPS Agreement have been implemented varies from country to country within Europe. To the extent that harmonization has occurred, it is with respect to specific copyright-related issues that the Council has legislated on. It can also be argued that harmonization is slowly occurring with respect to specific points that have arisen in cases before the CJEU.¹¹

The EU's copyright *acquis* with respect to copyright protection thus remains complicated, fragmentary and incompletely harmonized. Eight copyright-related directives were implemented between 1991 and 2004, one in 2012, and another in 2014.¹² While most provisions of the earlier Directives now seem quite uncontroversial, several of the more recent Directives have been subjected to extensive criticism. Post-Brexit, Britain will have the freedom to decide whether or not to maintain these legal principles in its domestic law.

Arranged in chronological order of the Directives that introduced them, the areas of distinctively EU copyright-related law that Britain may decide to maintain, amend or jettison from its law post-Brexit relate to:

i. Software / Computer Programs

Computer Programs and their preparatory design material were identified as 'literary works' (as defined by the Berne Convention) by a 1991 Directive¹³ that gave authors exclusive economic rights to reproduce, alter or distribute their programs. The Directive

⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

¹⁰ Bernt Hugenholtz, *supra* note 7, at 5.

¹¹ See, e.g., Eleonora Rosati, ORIGINALITY IN EU COPYRIGHT: FULL HARMONIZATION THROUGH CASE LAW (2013), arguing that the concept of 'originality' is being *de facto* harmonised by decisions of the CJEU.

¹² Several of these were subsequently updated or codified, causing complexity as to their names and citations.

¹³ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L 122.

was amended in 1993,¹⁴ when the term of the rights was extended from 50 years to 70 years after an author's death. It was updated by a 2009 replacement directive¹⁵ that codified amendments, and was intended to clarify and remove differences between existing rights.¹⁶

ii. Rental Rights

Rental Rights were introduced by a Directive in 1992¹⁷ that enabled authors, performers, phonogram producers, film producers and directors, and broadcasters to authorize or prohibit the rental and lending of copyright works and material covered by related rights.¹⁸ The original Directive was amended in 1993,¹⁹ when the minimum duration was extended and harmonized. It was then repealed and replaced by a codification in 2006.²⁰

iii. Satellite and Cable Transmission

The Satellite and Cable Directive 1993²¹ provided that satellite transmission of copyright works may occur only with the authorization of rights holders.²² Cable retransmission of copyright works was to occur only with the contractual authorization of rights holders.²³

iv. Copyright Term

In order to provide a uniform copyright term throughout the EU, the Term Directive 1993²⁴ extended the copyright term for much copyright material to 70 years *post mortem auctoris* (i.e. after the author's death).²⁵ This resulted in the harmonization of copyright

¹⁴ Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights [1003] OJ L 290.

¹⁵ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) [2009] OJ L 111.

¹⁶ European Commission. (2009). LEGAL PROTECTION: COMPUTER PROGRAMS, available at http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/mi0016en.htm.

¹⁷ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ L 346.

¹⁸ *Id.* at art 1.

¹⁹ *Supra* note 13.

²⁰ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) [2006] OJ L 376.

²¹ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248.

²² *Id.* at art. 2, compulsory licensing could apply only if simultaneous terrestrial broadcast occurred: Article 3(2).

²³ *Id.* at art. 8.

²⁴ Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L 290.

²⁵ For example, the term for literary and artistic works was extended to "run for the life of the author and for 70 years after his death" (formerly 50 years after the author's death, as required by the *Berne Convention*); *Id.* at art 1(1).

terms with respect to cinematographic and other audio-visual works, which acquired protection for 70 years.

The CJEU has held that an effect of this law was to restore copyright to some works whose copyright term had already expired.²⁶

The Directive was amended in 2001, and replaced by a consolidated version in 2006.²⁷ This was significantly amended in 2011²⁸ to extend the term of protection for performers and sound recordings to 70 years.

v. Databases

The Database Directive 1996²⁹ provided for a two-tier system of protection for databases within the EU. First, it created a *sui generis* economic right for producers of databases, regardless of whether the database was original or innovative. This right is intended to reward the “investment of time, money and effort”³⁰ put into creating the database. It lasts 15 years and is renewable if substantive investments occur. Second, the Directive harmonized existing copyright law protecting original arrangements of material in databases.

As this scheme offers copyright to database makers in the EEA, rights in Britain are likely to be affected by Brexit. It is not yet clear what arrangements will be put in place after Brexit. While it seems likely that British-based database makers would continue to be covered by copyright, it remains to be seen whether database makers in the EU will continue to be protected in the UK post-Brexit.

In any event, database law may be an area in which Britain decides to deviate from EU law post-Brexit. The Database Directive has been criticized for providing protection that is “confusing and overlapping”.³¹ The quest to standardize database protection was also undermined by the inclusion of exceptions that Member States could choose whether or not to enact.³² A 2005 review of the Database Directive by the Council identified a

²⁶ Case C-60/98 *Butterfly Music Srl v Carosello Edizioni Musicali e Discografiche Srl (CEMED)*, OJ no. C246 of 28 August 1999, 5; ECR (1999) I-03939.

²⁷ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [2006] OJ L 372/12.

²⁸ Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights [2011] OJ L 265/1.

²⁹ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77.

³⁰ European Commission, *Legal Protection of Databases Directive Adopted*, Press Release IP/96/171 (27 February 1996), available at http://europa.eu/rapid/press-release_IP-96-171_en.htm?locale=en.

³¹ David Vaver, *Copyright in Europe: The Good, the Bad, and the Harmonised*, 10 AUSTRAL. INTELL. PROP. J. 185-196, 187 (1999).

³² *Supra* note 29. Art 9 is titled “Exceptions to the *sui generis* right” and states: “Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may,

variety of criticisms, including that its protection was “unclear in scope and ill-suited to target areas where innovation and growth should have been stimulated”,³³ that it “locks up data and information to the detriment of the academic community or other industries that depend on the availability of data and information to conduct their business or research,”³⁴ and that it “is too narrow in scope and thus fails to adequately protect investors in database products.”³⁵ Despite these problems, the review offered the fence-sitting conclusion:

“The argument could be made that, despite its limited effectiveness in creating growth in the production of European databases, the Directive does not impose significant administrative or other regulatory burdens on the database industry or any other industries that depend on having access to data and information.”³⁶

It may be that Britain will seize the opportunity provided by Brexit to depart from the principles established in EU database law and redesign its approach to database protection.

vi. Resale Rights (*Droit de Suite*)

The Resale Right Directive 2001³⁷ provides for artists to receive royalties when their works are resold. Known by the French term *droit de suite*, resale rights are provided for by the Berne Convention³⁸ and had existed in some EU Member States prior to the Directive. However, market distortion was thought to occur with resale of artworks being attracted to EU Member States – such as Britain – that lacked a resale right.³⁹

The resale right applies to art sales by an EU-national artist via an intermediary such as a gallery or art dealer. It is an inalienable right, meaning it cannot be waived⁴⁰ or transferred⁴¹ by the artist.

without the authorization of its maker, extract or re-utilize a substantial part of its contents: (a) in the case of extraction for private purposes of the contents of a non-electronic database; (b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved; (c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.”

³³ European Commission, *First Evaluation of Directive 96/9/EC on the Legal Protection of Databases*, DG INTERNAL MARKET AND SERVICES WORKING PAPER (European Commission: Brussels, 12 December 2005), 4.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 6.

³⁷ Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L 272.

³⁸ Berne Convention, *supra* note 8, at art. 14.

³⁹ Directive 2001/84/EC, *supra* note 37, *preamble* ¶ 8-11.

⁴⁰ *Id.* at art. 1(1).

⁴¹ *Id.* at art. 6(1).

Implementation of the resale right has been particularly controversial in Britain,⁴² where it has been heavily criticized for making the British art market less competitive than those of Hong Kong and New York. More generally, it has been criticized for failing to introduce “a workable and stringent set of new rules” and for distorting the art market.⁴³

Brexit would provide an opportunity to change or abandon the resale right in Britain,⁴⁴ though artists would be likely to oppose such a move.

vii. Online Environment

The Information Society Directive 2001⁴⁵ (“InfoSoc Directive”) sought to harmonize EU laws in preparation for assuming obligations under the World Intellectual Property Organization’s (“WIPO”) Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”) of 1996. In essence, these treaties responded to challenges presented by the growth of the Internet. The InfoSoc Directive required EU Member States to enact enabling legislation with respect to rights of reproduction, communication to the public, distribution (particularly in an online context), and digital rights management.

However, the InfoSoc Directive arguably had limited impact. This has been attributed to the many compromises that were made during negotiations that resulted in an extensive list of optional exceptions that Member States could adopt with respect to the new rights, thus undermining the Directive’s harmonizing effect.⁴⁶ Summarizing the criticisms, Peter Yu argues:

“[the Infosoc Directive] was ridden with compromises made to the copyright and communications industries, fails to address many important problems concerning copyright in the digital environment, such as applicable law, administration of rights and moral rights [and] also fails to

⁴² Charles Lewis, *Implementing the Artist's Resale Right Directive*, 2(5) J. INTELL. PROP. L. PRAC. 298-304 (2007). The impact of the resale right was assessed negatively in a report prepared for the British Art Market Federation: ARTS ECONOMICS, *The EU Directive on ARR and the British Art Market* (2014), available at: <http://tbamf.org.uk/wp-content/uploads/2014/09/ARR-Sector-Report-UK-2014.pdf>.

⁴³ Joerg Wuenschel, *Article 95 EC Revisited: is the Artist's Resale Right Directive a Community Act beyond EC Competence?* 4(2) J. INTELL. PROP. L. PRAC. 130-136 (2009).

⁴⁴ See, e.g., discussion in: Christopher Silvester, *Why Britain's world-class galleries and auction houses could benefit from Brexit*, *The SPECTATOR* (5 March 2016), available at <http://www.spectator.co.uk/2016/03/why-britains-world-class-galleries-and-auction-houses-could-benefit-from-brexit/>.

⁴⁵ Directive No. 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJL 167.

⁴⁶ Bernt Hugenholtz, *supra* note 7, at 7.

resolve significant differences between various EU member states and to harmonize copyright laws within the European Union.”⁴⁷

Again, Brexit presents an opportunity for Britain to depart from aspects of this law.

In light of a 2015 case⁴⁸ that highlighted differences in attitude between the approaches to private copying (an area covered by the InfoSoc Directive) of the British government and those of other parts of the EU,⁴⁹ a post-Brexit revision of the British law in this area might not be surprising.

viii. Enforcement

The Enforcement Directive 2004⁵⁰ is concerned with harmonization of civil enforcement mechanisms with respect to existing intellectual property rights. The Directive’s subject matter includes copyright but also extends to EU intellectual property laws more widely. Its goal is to ensure that “all Member States will have a similar set of measures, procedures and remedies available for right holders to defend their intellectual property rights (be they copyright or related rights, trademarks, patents, designs, etc.) if they are infringed.”⁵¹ Rather than amending or introducing substantive rights, the Directive harmonized the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. This includes provisions for the production of evidence and the use of injunctions.⁵²

Particularly if the negotiating parties seek a soft Brexit effect with respect to intellectual property law, it seems likely that Britain would agree to maintain these legal principles in its domestic law post-Brexit. Doing so would make it easier for rights holders to enforce intellectual property laws within both Britain and the EU, without confronting

⁴⁷ Peter Yu, *An Overview of the EU Information Society Directive* (2001), available at <http://www.peteryu.com/gigalaw1101.pdf>.

⁴⁸ *British Academy of Songwriters, Composers and Authors Musicians’ Union & Ors, R (on the application of) v Secretary of State for Business, Innovation and Skills & Anor* [2015] EWHC 2041.

⁴⁹ *Id.* In this case, the UK High Court held that it was unlawful for the British government to have made the s28B amendments to the *Copyright, Designs and Patents Act 1988* – which gave effect to the *InfoSoc Directive* art 5(2)(b) and legalised personal copying by content purchasers for private, non-commercial use – without introducing a mechanism for fairly compensating rights holders. The British approach had reflected a desire to avoid creating a cumbersome compensation scheme by introducing private use provisions that would cause little or no harm to rights holders. By contrast, the majority of EU Member States that introduced the private copying exceptions had also introduced schemes that funded compensation via levies.

⁵⁰ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 157.

⁵¹ European Commission, *The Enforcement Directive* (2014), available at http://ec.europa.eu/internal_market/iprenforcement/directive/index_en.htm.

⁵² In 2005, the Council proposed a second enforcement directive (*Proposal for a European Parliament and Council Directive on Criminal Measures aimed at ensuring the enforcement of Intellectual Property Rights*, COM (2005) 276/1’) to supplement the 2004 Directive by harmonizing criminal enforcement mechanisms. However, this proposal was subsequently withdrawn (*Official Journal* C 252 of 18 September 2010).

substantially different procedural rules during litigation. This would arguably increase the attractiveness of both jurisdictions for investors and intellectual property-related industries.

ix. Orphan Works

Orphan works are materials that are protected by copyright but whose copyright holders cannot be identified or located to seek permission to use them. A 2008 European Commission Green Paper explored the difficulties associated with orphan works, such as those faced by libraries seeking to preserve such materials through digitization.⁵³

In response, the Orphan Works Directive 2012⁵⁴ provides for the digitization and online display of orphan works through a statutory exception-based model. To qualify, the works must have been first published or broadcast in the EU, and must then be treated in accordance with common rules established by the Directive. The orphan status may be reversed if a copyright holder recognizes the work and asserts its claim to copyright, and the Directive contains a mechanism by which a copyright holder may arrange return of its rights and fair compensation for use made of its work under the Directive.

To give effect to the Directive's requirements, in 2014, the EU launched a publicly accessible online Orphan Works Database⁵⁵ containing all orphan works⁵⁶ that have been identified after a diligent search for their copyright holders. Once a work is identified as an orphan in one EU Member State and placed in the database, it is treated as an orphan work throughout the EU.⁵⁷ It may then be digitized, made available, indexed, catalogued, preserved or restored by certain public interest organizations "in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration

⁵³ Commission of the European Communities, *Green Paper: Copyright in the Knowledge Economy* (Brussels, COM(2008) 466/3), available at http://ec.europa.eu/internal_market/copyright/docs/copyright-info/greenpaper_en.pdf.

⁵⁴ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, [2012] OJ L 299, 5–12.

⁵⁵ The database is located at: <https://ukeuipo.europa.eu/orphanworks/>.

⁵⁶ The definition of 'orphan works' covered by the Directive (*supra* note 54) includes copyright-protected works "published in the form of books, journals, newspapers, magazines or other writings contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions; (b) cinematographic or audiovisual works and phonograms contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions; and (c) cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002 and contained in their archives": art 1(2), as well as certain unpublished works and phonograms: art 1(3).

⁵⁷ *Id.* art. 4: "A work or phonogram which is considered an orphan work according to Article 2 in a Member State shall be considered an orphan work in all Member States. That work or phonogram may be used and accessed in accordance with this Directive in all Member States."

of, and the provision of cultural and educational access to, works and phonograms contained in their collection.”⁵⁸

Britain had also grappled with orphan works issues for some time. Two government reports recommended change,⁵⁹ with the latter proposing implementation of an “efficient digital copyright licensing system, where nothing is unusable because the rights owner cannot be found”.⁶⁰

The same day as the EU Directive took effect (29 October 2014), Britain launched a national orphan works scheme.⁶¹ This includes a licensing system, which enables users to apply to the UK’s Intellectual Property Office (“UKIPO”) for a license to use an orphan work for commercial and/or non-commercial uses within Britain.⁶² Meanwhile, similar to the EU scheme, a statutory exception also allows certain public interest organizations to use orphan works under specified conditions.⁶³

Britain’s orphan works provisions are much broader than required by the Directive. Given criticisms of the EU scheme⁶⁴ and recommendations about how the domestic scheme could be improved,⁶⁵ Brexit may provide an opportunity for Britain to revisit orphan work issues free of the constraints of the EU’s Orphan Works Directive.

x. Collective Rights Management

The Collective Rights Management Directive 2014⁶⁶ followed an earlier Council Recommendation⁶⁷ and aimed to “provide for coordination of national rules concerning

⁵⁸ *Id.* art. 6(2).

⁵⁹ Andrew Gowers, *Gowers Review Of Intellectual Property* (2006), 69-72, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/22884; and Ian Hargreaves, *Digital Opportunity: A Review Of Intellectual Property And Growth* (2011), 38 [Hargreaves Review], available at <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreviewfinalreport.pdf>.

⁶⁰ Hargreaves Review, *id.* at 97, §11.4.

⁶¹ *Enterprise and Regulatory Reform Act 2013*, § 77. This operates alongside the amendments that transpose the EU Directive into British law: *Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014*, S.I. 2014/2861.

⁶² National register, available at <https://www.orphanworkslicensing.service.gov.uk/view-register>.

⁶³ *Copyright, Designs and Patents Act 1988*, s44B and Schedule ZA1. The relevant public interest organizations are a publicly accessible library, educational establishment or museum; an archive; a film or audio heritage institution; or a public service broadcasting organisation: Schedule ZA1(2)(1). These organizations do not infringe the copyright in an orphan work in their collections by making the orphan work available to the public; or by reproducing the orphan work for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration: Schedule ZA1(1)(1).

⁶⁴ Eleonora Rosati, *The Orphan Works Directive, or Throwing a Stone and Hiding the Hand*, 8(4) J. INTELL. PROP. L. PRAC., 303-310 (2013).

⁶⁵ Intellectual Property Office, *Orphan works: Review of the First Twelve Months* (2015), available at <https://www.gov.uk/government/publications/orphan-works-annual-report>.

⁶⁶ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, [2014] OJ L 84, 72–98.

access to the activity of managing copyright and related rights by collective management organizations, the modalities for their governance, and their supervisory framework”.⁶⁸ It includes provisions harmonizing rules concerning collective rights management organizations, as well as provisions making it easier to grant cross-border licenses of authors’ rights, particularly with respect to music.

This approach has been criticized as inadequate by the Max Planck Institute for Innovation and Competition (based in Munich, Germany), which argues that further harmonization of substantive copyright law is needed to facilitate cross-border licensing.⁶⁹ Brexit seems unlikely to assist with the fulfilment of this ambition.

xi. Brexit and the EU’s ongoing copyright harmonization project

The Max Planck Institute’s urging of further copyright harmonization accords with other efforts to more closely integrate the EU’s copyright laws. Brexit makes it far less likely that Britain will remain part of these harmonization initiatives, which are currently twofold.

First, the EU has been working on a strategy to create a Digital Single Market (“DSM”) in which the principle of the free movement of goods, persons, services and capital could be extended online. With respect to copyright, this initiative involves further harmonization of national copyright laws to reflect the impact of new technologies, and the streamlining of online access to copyright-protected content across the EU.

The DSM centrepiece, the General Data Protection Regulation (“GDPR”),⁷⁰ was adopted on 27 April 2016 (prior to the Brexit referendum) and is due to take effect throughout the EU by 25 May 2018 (before Brexit is likely to take effect). The British government had been enthusiastic about the DSM⁷¹ and, despite Brexit, Britain may well decide to incorporate GDPR principles into its domestic laws. Doing so could see Britain granted “adequacy” status post-Brexit, meaning data could continue to flow freely between and the EU. This outcome is likely to be in the best interests of the British and EU economies alike.

⁶⁷ Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) [2005] OJ L 276, 54–57.

⁶⁸ *Id.*, at art. 8.

⁶⁹ Max Planck Institute for Intellectual Property and Competition Law, *Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on Collective Right Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market COM (2012)372*, available at http://www.ip.mpg.de/files/pdf2/Max_Planck_Comments_Collective_Rights_Management.pdf.

⁷⁰ Regulation on the Protection of Natural Persons with regard to the processing of Personal Data and on the Free Movement of such Data, and repealing Directive 95/46/EC (General Data Protection Regulation).

⁷¹ See, e.g., for a statement of British government policy prior to May 2015: UK VISION FOR THE EU’S DIGITAL ECONOMY, available at <https://engage.number10.gov.uk/digital-single-market/>.

Whether Britain would continue further down the DSM harmonization path is likely to depend on whether a soft or hard Brexit agreement with the EU is negotiated. However, if the territory covered included the large British market, the EU's DSM harmonization goals would arguably be more effective and would make Europe a more attractive investment destination for intellectual property-related industries.

The second initiative – linked to the more recent DSM approach to copyright harmonization – has been an older push towards harmonizing copyright-related issues that remain outside the EU *acquis*. Those are currently matters for British domestic law and are unlikely to change as a result of Brexit. They include definition of the concept of 'originality', rules on ownership of copyright works (especially those created in the course of employment), identifying "the public" in the context of communication of works, identifying the "connecting factors" or "points of attachment" to a jurisdiction that give rise to copyright in that territory, moral rights, and exhaustion of rights.⁷² This is contentious, and an earlier attempt arguably failed when the proposed Directive on Copyright Harmonisation 1997⁷³ was wound down into the narrower InfoSoc Directive in 2001.⁷⁴

Even before Brexit became likely, the furtherance of this harmonization project was stalling. In 2013-2014, the Council had engaged in a public consultation with a view to modernize copyright law. Known as the "Communication on Content in the Digital Single Market",⁷⁵ the review built on principles set out in the Council's 2011 intellectual property strategy document.⁷⁶ These included: multi-territorial collective management and cross-border licensing, creation of European digital heritage libraries, and measures to combat piracy and to improve the legal framework for customs actions.⁷⁷ With respect

⁷² For a discussion of these issues, see EC, *Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights*, 19 July 2004, SEC (2004) 995, 13-17, available at http://ec.europa.eu/internal_market/copyright/docs/review/sec-2004-995_en.pdf

⁷³ Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM/97/0628 final - COD 97/0359.

⁷⁴ See M. Hart, *The Proposed Directive for Copyright in the Information Society: Nice Rights, Shame about the Exceptions*, 20(5) EUR. INTEL. PROP. REV. 169-171 (1998); Marie-Christine Janssens, *The Issue of Exceptions: Reshaping the Keys to the Gates in the Territory of Literary, Musical and Artistic Creation*, in RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT (Estelle Derclaye, ed., 2009), 317-348, 327.

⁷⁵ European Commission, *Communication from the Commission On content in the Digital Single Market*, COM/2012/0789, available at <http://eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:52012DC0789&from=EN>.

⁷⁶ European Commission, *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions on A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe* COM(2011) 287.

⁷⁷ European Commission, *Commission sets out "blueprint" for Intellectual Property Rights to boost creativity and innovation*, Press Release, IP/11/630 (24 May 2011); European Commission, *Copyright: Commission urges Industry to deliver Innovative Solutions for greater access to Online Content*, Press Release, IP/12/1394 (18 December 2012).

to the possibility of introducing a unified copyright title to replace national laws with a harmonized EU copyright law, the document noted:

“Some see this as the only manner in which a truly Single Market for content protected by copyright can be ensured, while others believe that the same objective can better be achieved by establishing a higher level of harmonisation while allowing for a certain degree of flexibility and specificity in Member States legal systems”⁷⁸

However, even before discussions of Brexit, Bernt Hugenholtz expressed scepticism about the project:

“On balance, the process of harmonisation in the field of copyright and related rights has produced mixed results at great expense, and its beneficial effects on the Internal Market are limited at best, and remain largely unproven. Twenty years of harmonisation of copyright law have not produced a solid, balanced and transparent legal framework in which the knowledge economy in the EU can truly prosper. Even worse, the harmonisation agenda has largely failed to live up to its promise of creating uniform norms of copyright across the EU.”⁷⁹

In light of Brexit, it now seems even less likely that uniform copyright norms will be implemented across Europe. However, Britain’s exit from the EU (and thus the removal of the need to compromise between common law and civil law approaches to copyright) might make it easier for the remaining Member States to reach consensus on some copyright issues.

IV. DESIGNS

Unless other transitional arrangements are put in place, EU registered and unregistered designs will cease to have effect in Britain as a result of Brexit. Brexit will not affect British registered and unregistered designs, but – without transitional provisions – EU design rights will not be able to be converted to British design rights due to novelty restrictions.

Design laws protect “the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation”.⁸⁰ Registered designs must relate to a

⁷⁸ European Commission, *Public Consultation on The Review of the EU Copyright Rules: Consultation Document* (Brussels, 5 December 2013), 36.

⁷⁹ Bernt Hugenholtz, *supra* note 7, at 8.

⁸⁰ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs OJ EC No L 3,

particular product described in accordance with the Locarno Classification.⁸¹ While the Paris Convention⁸² has required design protection since 1958, signatories are free to select their own protection mechanisms.⁸³ This gives the EU and Member States (including Britain) flexibility about how to protect designs within their borders.

Since 2007, the EU has been a signatory to the WIPO-administered Hague System for the International Registration of Industrial Designs, which – by enabling the registration of multiple designs in multiple territories through a single international application – has made it easier for EU rights holders to protect their designs outside the EU, and vice versa. The UK Intellectual Property Office (“UKIPO”) has affirmed that the British government intends to ratify the Hague Agreement in a national capacity,⁸⁴ which will allow designers to register in multiple jurisdictions – including the EU and Britain – through a single international application.

In its 1991 Green Paper on the Legal Protection of Industrial Design,⁸⁵ the Council recommended harmonization of national design laws, and creation of a system of registered and unregistered Community Designs. The EU’s Design Directive⁸⁶ was adopted in July 1998, following years of consultation, and was described at its instigation as “clearly a victory for the EU’s free trade concept.”⁸⁷

In conjunction with the Design Regulation,⁸⁸ the Directive provides the basis for unitary design rights that give their owners protection throughout the whole EU. In effect since 1 April 2003, the system provides methods of protecting EU-wide registered and unregistered design rights that operate in parallel with national design laws.

Subject to any contrary agreement between Britain and EU reached during the negotiation period, it is expected that EU design rights will cease to apply in Britain

amended by Council Regulation No 1891/2006 of 18 December 2006 amending Regulations (EC) No 6/2002 and (EC) No 40/94 to give effect to the accession of the European Community to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs [2006] OJ EC No L 386 14, Art. 3 (a).

⁸¹ *Locarno Agreement Establishing an International Classification for Industrial Designs*.

⁸² *Paris Convention for the Protection of Industrial Property* (20 March 1883; effective 7 July 1884, and amended 2 June 1934 and 14 July 1967).

⁸³ Catherine Seville, *EU INTELLECTUAL PROPERTY LAW AND POLICY* (2009), 181.

⁸⁴ Intellectual Property Office, *UK’s Accession to the Hague Agreement for Industrial Designs: Government response to the consultation on the UK’s proposed accession to the Hague Agreement for industrial designs* (15 September 2015) page 2. Following the Brexit referendum result, this intent was reiterated by the UKIPO: *supra* note 6.

⁸⁵ EU Commission, *Green Paper on the Legal Protection of Industrial Design. Working Document of the Services of the Commission III/F/5131/91-EN*.

⁸⁶ Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs [1998] OJ L 289, 28–35.

⁸⁷ Christopher M. Aide, *The Community Design: European Union-Wide Protection for Your Design Portfolio*, 1(1) NW. J. TECH. INTELL. PROP. 35-46, 46 (2003).

⁸⁸ *European Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community designs* [2002] OJ EC No L 3. It was implemented by Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs.

following Brexit. However, the structure of the EU design framework means that it would make sense for options to be put in place to enable rights holders to utilize Britain's national design system post-Brexit in a manner that maintains protection across Britain as well as the EU.

The partial harmonization of EU design law has offered several ways of protecting the appearance of products within the Member States, and this will leave designers with various protection options post-Brexit. The Directive sets out uniform standards with respect to substantive eligibility requirements,⁸⁹ the scope of design protection,⁹⁰ the term of protection,⁹¹ and the circumstances in which design rights may be refused or invalidated.⁹² In order to obtain protection in the EU, a design must be novel,⁹³ meaning no identical design has already been made available to the public.⁹⁴ It must have "individual character",⁹⁵ which is judged by whether an "informed user" would consider it different from the overall impression of any design which has been made available to the public,⁹⁶ and it must not be composed of visual features dictated solely by the product's technical function.⁹⁷ As the laws of all EU Member States must comply with the Directive,⁹⁸ British domestic law currently accords with these standards, though Britain may have no obligation to ensure its design laws comply with EU standards following Brexit.

The types of design laws currently offering protection within the EU (including Britain), which will be impacted by Brexit, can be outlined as follows:

i. Registered Community Designs (RCD)

RCDs became available from 1 April 2003. They apply throughout the EU, so, unless the EU and Britain agree otherwise, RCDs will no longer protect designs in Britain post-Brexit.

Applications for RCDs may be made within a year (the "grace period") from the date on which the design was first made available to the public.⁹⁹ Applications may be filed either with the International Bureau of the WIPO (as an "international application" under the Hague Agreement,¹⁰⁰ designating the EU as a jurisdiction in which protection

⁸⁹ *Id.* at art. 1 & 3-8.

⁹⁰ *Id.* at art. 9.

⁹¹ *Id.* at art. 10.

⁹² *Id.* at art. 11.

⁹³ *Id.* at art. 4 (1).

⁹⁴ *Id.* at art. 5.

⁹⁵ *Id.* at art. 4 (1).

⁹⁶ *Id.* at art. 6.

⁹⁷ *Id.* at art. 8.

⁹⁸ *Id.* at art. 2.

⁹⁹ *Supra* note 86, at art. 7(2).

¹⁰⁰ *The Hague Agreement Concerning the International Deposit of Industrial Designs*, as amended.

is sought), in national registries or the Benelux design office, or directly with the European Union Intellectual Property Office (“EUIPO”). The application will be examined for formalities by EUIPO, which will also assess whether the design described in the application meets the legal definition of a RCD, and whether the design contains any element that would offend public policy or morality in any part of the EU. No further substantive examination is conducted before the design is registered.

Registration determinations are made by the relevant department within EUIPO, whose decisions can be appealed to EUIPO’s Boards of Appeal. While rare,¹⁰¹ it is possible for Board of Appeal decisions to be appealed to the General Court, whose decisions can in turn be appealed to the CJEU on points of law. For this reason, practitioners have argued “it will definitely take years before the European courts will have laid down a set of rules and principles which is reliable enough to navigate through the trials and tribulations of European design law.”¹⁰²

RCDs may be renewed every five years, up to a maximum of 25 years. During this period, an RCD provides its holder with exclusive rights to use the design and to prohibit its unauthorized use. This covers “making, offering, putting on the market, importing, exporting or using of a product in which the design is incorporated or to which it is applied, or stocking such a product for those purposes” within the EU.¹⁰³ While RCDs may only be transferred with respect to the entire territory of the EU, they may be licensed with respect to part or the whole of the EU.

It is not necessary to prove copying of the design when suing for RCD infringement. Civil infringement actions may be brought in a national Community Design Court, but orders against infringers can apply across the EU. Criminal enforcement actions may also be used in cases involving the counterfeiting of designs. However, as these provisions have not been harmonized throughout the EU, the options available to a RCD holder depend on those offered under the national laws where the infringement occurs. A common counterclaim in infringement proceedings involves a request for a declaration that the RCD is invalid.¹⁰⁴

It remains to be seen what Brexit will mean for existing RCDs. As RCDs are expected to cease to cover British territory after Brexit, RCD owners may need to seek other avenues by which to protect their designs in Britain. However, the requirement that a design be novel to be registered¹⁰⁵ may make it impossible to re-register an RCD under British domestic design law. It would therefore make sense for Britain to put in place

¹⁰¹ Bardehle Pagenberg Partnerschaft mbB, DESIGN PROTECTION IN EUROPE (2013), 9.

¹⁰² *Id.*

¹⁰³ *Supra* note 86, at art. 12.

¹⁰⁴ Bardehle Pagenberg Partnerschaft mbB, *supra* note 101, 8.

¹⁰⁵ *Supra* note 86, at art. 4 and art. 5.

transitional provisions that, for example, would allow owners of RCDs to protect their existing investments by converting their RCD rights to national British designs, or that continue to recognize existing RCDs in Britain until their expiry dates.

Going forward, it would make sense for designers to use the priority period to register both an RCD and a national British registered design (discussed below in (iii)) for new designs, thus using both systems to seek protection in as much European territory as would have been covered by an RCD prior to Brexit.

ii. Unregistered Community Designs (UCD)

UCDs came into effect on 6 March 2002 and provide rights that arise automatically when an eligible design is first published or used within the EU. Subject to any agreement to the contrary, they too can be expected to cease to apply in Britain following Brexit.

UCDs offer protection for three years from the date on which the design was first made available to the public within the EU. They are valid throughout the EU – including pre-Brexit Britain – and provide useful short-term protection that is particularly suitable for products that are likely to have a short lifespan on the market, and for those products with respect to which designs have not been registered. The rights conferred by a UCD are the same as those of an RCD, as are the mechanisms for enforcement. However, in order to enforce a UCD it is necessary to prove the design has been copied by the purported infringement.

Following Brexit, similar transitional principles would ideally apply to UCDs as have been proposed above with respect to RCDs.

iii. National Designs

In addition to RCDs and UCDs, EU Member States may register national designs, and may recognize rights in unregistered designs.

National design laws provide for protection of designs within domestic boundaries and must comply with the Directive's requirements. Member States are left to choose their own procedures for registration, renewal and invalidation of national design rights, and they may provide additional protection such as unregistered design rights and laws against unfair competition.¹⁰⁶

British law hosts both an unregistered design right¹⁰⁷ and a design registration system¹⁰⁸ administered by the UKIPO. The unregistered design right automatically gives 15 years protection over the design's shape or configuration from when it was first created, or ten

¹⁰⁶ Catherine Seville, *supra* note 83, 183.

¹⁰⁷ *Copyright, Designs and Patents Act 1988*, Part III.

¹⁰⁸ *Registered Designs Act 1949*; *Copyright, Designs and Patents Act 1988*, Part IV.

years protection from when it was first sold.¹⁰⁹ The registered design protects the appearance (e.g. shape, configuration or decoration) for 25 years, subject to having been renewed every five years.¹¹⁰

Following Brexit, this national system will be able to continue operating in Britain, and may or may not continue to accord with the EU Directive.

iv. General Design Protection Considerations

In pre-Brexit Britain, designers therefore have the choice of four overlapping types of protection – they can register a RCD or a UK national design, and they can rely on UCDs or unregistered national design law. Following Brexit, only the two types of national design rights will apply in Britain (unless law-makers enact arrangements to the contrary), while RCDs and UCDs will continue to apply throughout the remaining EU nations. As the validity requirements are more stringent, and the protection for national unregistered designs in Britain is narrower than that conferred by the UCD, designers may need to consider using registered designs to gain closer equivalence to UCD protection post-Brexit.

Long before the Brexit referendum, the confusion caused by the complication of four different types of design rights in the EU was already leading to calls for simplification and reform. For example, Britain's 2011 Hargreaves Review concluded:

“Designers believe a patchwork of intellectual property right (IPR) provision[s] puts them at a disadvantage in comparison with sectors fully covered by copyright law. With the emergence of fabrication through 3D printing, new technological challenges also arise, indicating the need for a thorough reassessment of IP and design”.¹¹¹

British-based intellectual property scholars have likewise criticized the EU designs framework. For example, Thomas Margoni has argued that the framework favours the industrial sector rather than “modern, digitally based, individual or small-sized, 3D printing, open designers and their needs”,¹¹² and has criticized it for not prioritizing protection of innovative products.¹¹³ Identifying “subject matter that defies strict

¹⁰⁹ *Copyright, Designs and Patents Act 1988*, §216.

¹¹⁰ *Registered Designs Act 1949*, §8; *Copyright, Designs and Patents Act 1988*, §269.

¹¹¹ Ian Hargreaves, *DIGITAL ECONOMY - A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH*, ch. 5, 7. See also Intellectual Property Office, *CONSULTATION ON THE REFORM OF THE UK DESIGNS LEGAL FRAMEWORK* (2012) and Intellectual Property Office, *THE CONSULTATION ON THE REFORM OF THE UK DESIGNS LEGAL FRAMEWORK GOVERNMENT RESPONSE* (2013).

¹¹² Thomas Margoni, *Not for Designers: On the Inadequacies of EU Design Law and how to fix it*, 4(3) J. INTELL. PROP. INFO. TECH. E-COM. L. 225-248, 225 (2013).

¹¹³ *Id.* at 248.

definitional parameters”,¹¹⁴ artificial distinctions between functional and visually appealing objects,¹¹⁵ and an awkward property-approach (when a misappropriation approach may be more suitable),¹¹⁶ Uma Suthersanen similarly questions the rationale of the EU’s design system. Concluding pessimistically that the law is moribund and of little use to designers, she queries attitudes of law-makers that seem so out of step with the ways in which industrial designs are created and consumed.¹¹⁷

In light of such criticisms, Britain may perhaps take the opportunity afforded by Brexit to review design protection and to implement a post-Brexit design-rights system that covers voids that will be left after the RCD and UCD cease to apply in its territory. Such a review would also provide an opportunity to redress other problems that have been identified with the existing regime.

V. PATENTS

Brexit seems likely to produce little immediate change from the current position with respect to patent law, but it may lead to significant longer-term consequences.

Patents offer inventors in any field time-limited monopolies to exploit technologies that are new, non-obvious (i.e. inventive), and capable of industrial application. The Paris Convention and TRIPS Agreement require minimum standards of protection, but, despite several aborted efforts to create an EEC/EU patent system,¹¹⁸ harmonization of European patent law has not yet progressed significantly beyond general compliance with global standards.

In a 2005 judgment, the CJEU stated:

“As Community [patent] law now stands, there is none... The fact is that the Community has not yet exercised its powers in the sphere of patents or that, at the very least, at [the] internal level, that exercise has not to date been of sufficient importance to lead to the conclusion that, as matters now stand, that sphere falls within the scope of Community law.”¹¹⁹

¹¹⁴ Uma Suthersanen, *Function, Art and Fashion: Do We Need the EU Design Law?*, QUEEN MARY UNIVERSITY OF LONDON, SCHOOL OF LAW, LEGAL STUDIES RESEARCH PAPER NO.88/2011, 20.

¹¹⁵ *Id.* at 21.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 22.

¹¹⁸ Notable attempts were an attempt in the 1950s to create a unitary patent system for the EEC, and the *European Patent Litigation Agreement* (formally, the *Draft Agreement on the establishment of a European patent litigation system*, 2005), which was abandoned in 2007. See Justine Pila, *The European Patent: An Old and Vexing Problem*, 62(4) INT’L & COMP. L.Q. 917–940 (2013); Charlotte Waelde et al., CONTEMP. INTELL. PROP. L. POL’Y (3rd ed., 2013), 373, ¶ 10.29; Catherine Seville, 83 note at 77, 91.

¹¹⁹ Case C-431/05 *Merck Genéricos - Produtos Farmacêuticos Ld v Merck & Co. Inc. and Merck Sharp &*

Relatively little has occurred in practice since that judgment was delivered but this has been due to change during 2017, when a European unified patent and patent court have been expected to come into effect.¹²⁰ If they come to fruition, this will represent a dramatic reform of EU patent law. Signs suggest that it may still happen, even though the Brexit referendum outcome has beset these plans with uncertainty.

The result is that Brexit is unlikely to bring about much change from the prevailing patent framework in Europe, but it might affect progress towards an EU-wide patent and patent court in the future.

i. The Existing Patent Framework

The 1973 conclusion of the European Patent Convention (“EPC”)¹²¹ led to a degree of harmonization of national patentability and validity standards up to the point of grant of a patent.¹²² Patents can be applied for via national or European processes, and patents issued in Europe remain national in character. Thus, patents only apply in Britain if registered there, and the same applies with respect to patents in other EU Member States.

Without a unified jurisdiction in which disputes can be heard, there is not a common market with respect to patents, and a patent-holder may need to sue in multiple European nations to address a single patent enforcement issue.

Brexit is, therefore, unlikely to have significant effect on the prevailing patent arrangements within the EU, which can be summarized as follows (note that, although separate, the various patent types are intertwined):

- **National applications:** inventors apply to patent offices within individual nation states. The resulting patents are valid only within the relevant national territorial boundaries. Brexit is unlikely to have any effect on national patent applications, whether in Britain or in other EU Member States.
- **European applications:** the European Patent Office (“EPO”) is an administrative office that issues patents that apply nationally within individual European states that are members of the EPC.¹²³ The system allows an applicant to file a centralized patent application at the EPO nominating some or all of the 38 signatory states (which includes all EU Member States) in which it wishes to hold a patent. Once granted, this becomes a bundle of national patents.

Dohme Ld [2007] 3 CMLR 49 (¶¶ 40 and 46).

¹²⁰ On 16 January 2017, the Unified Patent Court website predicted that the Court could become operational in December 2017. See the UPC’s news announcement: “UPC – Provisional Application”, available at <https://www.unified-patent-court.org/news/upc-provisional-application>.

¹²¹ The EPC has been subject to subsequent revisions.

¹²² Catherine Seville, *supra* note 83, at 101 & 142.

¹²³ As a group, these states form the European Patent Organisation.

The EPO is governed by the EPC, which is unrelated to the EU. Existing arrangements are therefore unlikely to be affected by Brexit.

Headquartered in Munich, with other offices in The Hague, Berlin, Vienna and Brussels, the EPO deals with patent applications which include filing, examination, opposition and appeals. Infringement matters are heard in national courts, with the consequence that the same patent might be litigated repeatedly in different national courts. European patents can be revoked either by the EPO during opposition proceedings, or by national courts during nullity proceedings. If revoked, the patent falls in all jurisdictions in which it is registered.

Despite Brexit, inventors will still be able to obtain patents from the EPO covering all EPC states (including Britain and other non-EU Member States, such as Turkey), and patent attorneys from Britain and the EU will continue to be able to act before the EPO. Brexit is therefore unlikely to affect the EPO's existing arrangements for awarding patents.

- **International applications:** the EPO is a Receiving Office of WIPO's Patent Cooperation Treaty ("PCT"),¹²⁴ which allows applicants to lodge an "international" application to simultaneously seek national patents in up to 151 countries. Applicants file a single application and pay a single set of fees, and searches are performed by an International Searching Authority ("ISA"), one of which is the EPO. After publication of the application and optional supplementary searches and/or an optional additional patentability analysis by an ISA, the PCT-member patent offices nominated by the applicant assess the patent application in accordance with their domestic laws and practices. National patents are granted by any nominated offices that find the application to be valid.

As this process involves a non-EU organization and domestic patent laws, it seems unlikely that Brexit will have an impact on PTC applications.

ii. Unitary Patent and Unified Patent Court

A plan to introduce a patent with effect in all EU Member States has gained momentum in recent years. With a view to simplifying procedures, reducing costs, and improving efficiency and consistency, it is planned that the EPO will adopt responsibility for registering patents with "unitary effect" throughout the EU. The introduction of Unitary Patents and a specialized European patent court has been seen as a way of finally harmonizing EU patent law. The system had been due to commence in early 2017,¹²⁵ but Brexit introduced complications, and its entry into force has been delayed.

¹²⁴ Patent Cooperation Treaty, 1970.

¹²⁵ EPO ANNUAL REPORT (Mar. 2, 2016), available at <http://www.epo.org/about-us/annual-reports->

The Unitary Patent system's commencement is dependent on certain preconditions being reached, one of which is ratification of the Agreement on a Unified Patent Court (UPC Agreement) by Britain.¹²⁶ After the Brexit referendum, this step was in question as membership of the EU is a requirement for participation in the Unitary Patent system and Unified Patent Court ("UPC"). However, in late 2016, Britain announced that it would ratify the UPC Agreement.¹²⁷ Britain remains a member of the EU until Brexit occurs in 2019 (or beyond, if negotiations are delayed), and it can ratify the UPC Agreement during this intermediate period. Along with ratifications from the other necessary EU Member States, this would allow the Unitary Patent and UPC to commence as planned. Negotiations could then occur with other Unitary Patent/UPC members about whether Britain would remain in the system post-Brexit and, if so, how the system's constitutional arrangements would need to be modified to allow this.¹²⁸

If/when the Unitary Patent becomes operational, patentees will be able to opt for a single patent that will have effect across all jurisdictions participating in the scheme. The EPO will apply EPC rules and procedures in assessing patentability and validity standards for unitary patent applications, as it already does with respect to the existing system of European applications.

Associated with the Unitary Patent is the establishment of the UPC.¹²⁹ This is independent from the EPC/EPO and the EU, but it implicates both. Consisting of a Registry in Luxembourg, a Court of First Instance with seats in Paris, London (though Brexit has thrown this into some doubt) and Munich (and in other locations if established by participating states), and a Court of Appeal in Luxembourg, the UPC has been designed to have exclusive jurisdiction over Unitary Patent infringement and revocation proceedings in signatory EU Member States.

The planned effect is that litigation with respect to affected European patents would be able to take place in a single court, rather than having to be heard separately by courts in each Member State in which infringement occurs. Patent Arbitration and Mediation

statistics/annual-report/2015/highlights.html.

¹²⁶ Under the *Agreement on a Unified Patent Court* (2013/C 175/01), it will come into force on the first day of the fourth month after it has been signed and ratified by 13 Member States (including France, Germany and the UK), and amendments to the Brussels I Regulation to accommodate the UPC have come into effect. At the time of writing, the UPC website was predicting the UPC would commence in December 2017: *Final Preparatory Committee Signals State of Readiness*, <https://www.unified-patent-court.org/news/final-preparatory-committee-signals-state-readiness-15-march-2017> (last visited 29 March 2017).

¹²⁷ *EPO President welcomes UK Decision to ratify UPC Agreement*, <https://www.epo.org/news-issues/news/2016/20161129.html> (last visited March 29, 2017).

¹²⁸ UPC Agreement, *supra* note 126.

¹²⁹ *Id.*, the UPC is to be established according to the UPC Agreement; *Regulation (EU) No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of Unitary Patent Protection*; and *Council Regulation No. 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of Unitary Patent Protection with regard to the applicable translation arrangements* [2012] OJ L 361.

Centres would be established in Ljubljana and Lisbon to offer alternative dispute resolution options.

Prior to the Brexit referendum, all EU Member States except Spain (which opposed the Unitary Patent package),¹³⁰ Poland (which adopted a “wait and see” approach),¹³¹ and Croatia (which joined the EU after work towards the Unitary Patent and UPC was well progressed) were involved. Britain – a nation with high rates of patent activity – had been a central participant. However, the impending Brexit creates uncertainty about how the system may need to be adjusted in response.

If the Unitary Patent System and UPC are to go ahead despite Brexit, there will need to be amendments to the system’s establishing instruments. If Britain is to leave the system and UPC following Brexit, options would be to remove mention of Britain from the instruments and/or move a seat of the UPC from London. This would result in Britain being erased from the jurisdiction of the Unitary Patent system and UPC. However, this would arguably weaken the system overall as Britain is a hub of patent activity, and the new system will be more useful to patentees if it covers both Britain and the remaining EU Member States.

Another possibility is that, during the negotiations concerning its withdrawal from the EU, Britain might be able to arrange ongoing membership of the Unitary Patent system. This is likely to appeal to proponents of the Unitary Patent, as the system will be significantly more attractive if it extends to Britain’s large economy. If a way could be found to allow a non-Member State to remain within the system, revisions of the establishing instruments may enable the Unitary Patent and associated UPC to proceed much as originally planned.

Interestingly, the system already lies outside the auspices of the EU due to a legal challenge to an earlier proposal to create a “European and Community Patent Court”, which had been found by the CJEU to be incompatible with EU law.¹³² As a result of that case, the UPC has been established by an intergovernmental agreement that falls outside

¹³⁰ With Italy, Spain applied to the CJEU for annulment of the unitary patent regulation on various grounds, including that the use of only the English, French and German languages was discriminatory. These claims were dismissed in 2013: *Joined Cases C-274/11 and C-295/11 Kingdom of Spain and Italian Republic v Council of the European Union*. Court of Justice of the European Union. However, further Spanish challenges to the two unitary patent regulations alleged improper delegation of powers to the EPO, misuse of power through the use of enhanced cooperation for purposes not provided for in the EU treaties, and breach of the principle of autonomy of EU law. These cases were lodged in late 2013 and dismissed on 5 May 2015: *Case C-147/13 Kingdom of Spain v European Parliament and Council of the European Union*; *Case C-146/13 Kingdom of Spain v Council of the European Union*.

¹³¹ Will Poland join the Unitary Patent system? *WORLD INTELLECTUAL PROPERTY REVIEW* (5 February 2013), available at: <http://www.worldipreview.com/news/will-poland-join-the-unitary-patent-system>.

¹³² Court of Justice of the European Union, Press Release No 17/11, available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/cp110017en.pdf>; ECJ Opinion 1/91 of 14 December 1991; ECJ Opinion 1/00 of 18 April 2002.

the EU institutional framework, even though it has involved only EU Member States. While scholars have identified various aspects of the unitary proposal that may raise similar disquiet as the earlier legal objections,¹³³ the independence of the system from EU control may ultimately assist Britain to remain in the Unitary Patent and UPC.

VI. TRADEMARKS

Following Brexit, and unless an agreement to the contrary is reached, EU-based trademarks will cease to apply in Britain. However, national British trademarks will continue unaffected.

Trademark law is one of the most harmonized areas of EU intellectual property law. Trademarks protect “signs” — such as words, personal names, logos (known as “devices”), designs, letters, numerals, the shape of goods and their packaging, slogans and sounds — that connect goods or services with a particular trader in the minds of consumers. Trademarks are often among a business’s most valuable assets but, in order to be protected, they generally need to be registered in each jurisdiction in which they will be used to brand goods and/or services.

The harmonization of its trademark law makes the EU a comparatively attractive market in which to do business because of the ease with which a trader can obtain legal protection for its brand across the whole common market. With Britain being such a large economy within the current EU, the European trademark system will arguably remain more useful to brand owners if it continues to cover Britain. If Brexit leads to the withdrawal of Britain from the European trademark system, cost and complication will increase for traders who will need to seek two types of trademark registrations to maintain the degree of protection over their brands that they enjoyed with one type of trademark pre-Brexit.

National trademarks and EU Trade Marks (“EUTMs”) may be registered within the EU. Not only are national trademark systems and the EUTM standardized in accordance with TRIPS Agreement and Paris Convention requirements, but both adhere to the same fundamental legal principles under EU law. While it does not fully harmonize EU trademark law, the Trademark Directive¹³⁴ harmonizes the conditions under which national trademarks must be registered and protected throughout the EU. Applicants

¹³³ Reto M. Hilty et al, *The Unitary Patent Package: Twelve Reasons for Concern*, 5 MAX PLANCK INSTITUTE FOR INTELLECTUAL PROPERTY AND COMPETITION LAW (2012), available at http://www.ip.mpg.de/files/pdf2/MPI-IP_Twelve-Reasons_2012-10-17_final3.pdf.

¹³⁴ Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks [2008] OJ L 299. This Directive repealed Council Directive No. 89/104/EEC to approximate the laws of the Member States relating to trade marks (Trademark Directive).

may apply for a national trademark, which applies only in the domestic jurisdiction(s) in which it is registered, and/or a EUTM, which has EU-wide application. EUTMs and national trademarks can be assigned, cancelled and/or enforced only in the jurisdiction(s) with respect to which they were granted.

Trademark applications are lodged with registries, which assess their registrability. Applications for both national trademark and EUTM applications can be rejected on “absolute grounds”,¹³⁵ which are objections to the sign itself. They can also be rejected on “relative grounds”, which involve a comparison between the proposed trademark and prior EUTMs, national trademarks in Member States, and other signs used as trade indicators (e.g. unregistered signs protected by passing off in Britain).

Applications for both a EUTM and a national trademark require that the applicant nominate the goods and/or services with respect to which the sign will be used as a trademark. As these are classified in accordance with the Nice Convention,¹³⁶ administered by WIPO, this procedural aspect of trademark registration is unlikely to be affected by Brexit.

Due to the large number of trademark cases that have come before it, the CJEU has heard cases concerning most areas of EU trademark law.¹³⁷ In doing so, it has built a rich trademark jurisprudence in a relatively short period of time. At present, the principles established by the CJEU apply to trademark registrations and enforcement actions in Britain. While it seems likely that principles established prior to the point at which Brexit occurs will continue to apply in the immediate future post-Brexit, these may then be subject to legislative change and judicial interpretation by British law-makers if a hard Brexit approach ultimately leaves Britain outside the EU’s trademark framework.

The various types of trademarks that are relevant to Brexit considerations are:

i. European Union Trade Mark (EUTM)

The European trademark system came into effect on 1 April 1996¹³⁸ and allows an applicant to file for an EUTM via a single European trademark registry at EUIPO in Alicante, Spain. The EUTM – known until 23 March 2016 as the Community Trade Mark

¹³⁵ Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (CTMR) [2009] OJ L 78/1, Art 7.

¹³⁶ Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks.

¹³⁷ For example, see Mattihas Leistner, *Harmonization of Intellectual Property Law in Europe: The European Court of Justice’s Trade Mark Case Law 2004-2007* COMMON MKT L. REV.45, 69-91 (2008).

¹³⁸ Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark [1994] OJ L 11. This was later repealed and replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark [2009] OJ L 78/1.

or CTM¹³⁹ – is a unitary trademark with effect throughout the whole of the EU, and it is therefore a cost-effective method of obtaining a trademark for use in all EU Member States. The initial registration period is 10 years from the date on which the application is filed, and registrations that remain valid can be renewed in 10-year blocks, indefinitely.

When the EUIPO receives an application, the registry examines it for formalities¹⁴⁰ and for absolute grounds for refusal of a registration. A trademark will not be registered if a ground of refusal is made out with respect to only part of the EU.¹⁴¹ However, if the application passes this stage, it proceeds to registration.

A decade after its inception, the EUTM was hailed as “one of the great success stories of the European intellectual property system.”¹⁴² Interviewed about its impact, lawyer John Olsen summarized its success by reference to the goals of the EU more generally:

“The net effect of the CTM during the last 10 years has been profound. It works to knit together the economies of all member countries as it was intended to do. Brand owners must always now consider their branding strategy in European terms – both affirmatively and defensively – with the CTM firmly in mind. It is doubtful that the architects of pan-national European institutions beginning with Jean Monnet himself have created anybody with a more central role in uniting European commercial life than the CTM.”¹⁴³

While Brexit is unlikely to have much effect on the EUTM system, EUTMs will cease to apply in Britain, and British trademarks (including unregistered rights protectable by passing off) may no longer be considered for relative ground opposition or cancellation proceedings involving a registered EUTM.

Post-Brexit, EUTMs that have been used only within Britain could become liable to be struck off for non-use in the rest of the EU and may need to be registered as a UK trademark to maintain protection in Britain. It is to be hoped that transitional provisions – such as a conversion system and/or recognition of seniority claims based on earlier rights – will be put in place to protect rights holders from Brexit-related collateral damage.

If Brexit leads Britain out of the EU, an interesting possibility is that Britain might decide its interests would nonetheless be well-served by maintaining the harmonization of its

¹³⁹ The name was amended by *EU Trade Mark Regulation* (Regulation (EU) No. 2015/2424).

¹⁴⁰ These requirements are set out in the *Community Trade Mark Implementing Regulation (EC) No 2868/95, 31/03/2009* (‘CTMIR’), rule 9 & art 26.

¹⁴¹ CTMIR, *id.* at art 7(2).

¹⁴² Joff Wild, *A European Success Story*, *WORLD TRADEMARK REV.* 35-44, 35 (July/August 2006).

¹⁴³ *Id.*

trademark law with EU trademark law. This could be achieved formally through a soft Brexit (e.g. if Britain were to leave the EU but remain in the EEA; colloquially dubbed “the Norway Option”) or by specific agreement with the EU, perhaps allowing Britain to remain within the EUTM. Alternatively, it could be done informally through British legislation, though this would allow Britain to follow EU trademark law but not to exert any influence over that law directly, and common law interpretations may in time diverge from those of the EU’s trademark decision-making authorities.

ii. UK Trademarks

National trademark systems pre-dated the EUTM and persisted after its introduction. In accordance with this tradition, Britain continues to operate a national system that registers trademarks that protect brands within Britain.

As well as or instead of applying for a EUTM, traders can choose to file a British trademark (colloquially referred to as a “UK trademark”) at the UKIPO. This may be cost effective if only trading domestically, and it may enable the national registration of a new British trademark that would not be registrable as a EUTM (e.g. because it conflicts with an existing trademark registered in another EU Member State).

If Britain were no longer part of the EUTM system following Brexit, little would need to change with respect to UK trademarks. However, traders who have formerly held EUTMs and who wish to maintain existing levels of protection for their trademarks in Britain would need to convert that mark to a UK trademark (if that is offered as a transitional option) or register a new British trademark. Meanwhile, infringement of EUTMs would no longer occur in Britain.

iii. Passing Off

In addition to trademark law, British domestic law includes “passing off”, a common law doctrine that effectively protects unregistered trademarks. The equitable tort of passing off protects indicia of trading reputation that have gained “goodwill” in the minds of local consumers of the relevant types of goods or services. If another trader then misrepresents its goods or services in a manner that does — or will potentially — confuse relevant consumers with respect to the source or quality of the plaintiff’s goods or services, and if this results in actual or potential damage, a case for passing off may be made out.

While passing off is particular to British law (and the laws of some former British colonies), its effect’s can be felt throughout the EU. This is because an indicator of reputation whose “goodwill” could be protected under British passing off law can amount to an earlier “sign” that is relevant to EUTM relative grounds considerations if it

has more than “mere local significance”.¹⁴⁴ The result is that earlier goodwill can be raised against EUTMs in opposition or cancellation proceedings after registration.

If EUTMs were to cease to apply in Britain post-Brexit, it would seem likely that the reference to trading reputation protected under British passing off law would become obsolete. As a result, new opportunities for EUTM registration may exist where applications would previously have been blocked on the basis of goodwill in Britain.

iv. International Trademark Registration (Madrid System)

Following Brexit, the Madrid System of international registration may help to streamline applications where trademarks are sought in both the EU and Britain. This could be increasingly useful to traders if Britain were to leave the EUTM system.

The Madrid System is an international system by which applicants from one jurisdiction may apply for trademark registration in other participating jurisdictions on the basis of existing applications or registrations in their home jurisdiction. It comprises the Madrid Agreement and the Madrid Protocol, and nationals of the signatories to each instrument can apply through the system for trademark registrations in other jurisdictions that are signatories to the same instrument.

Britain acceded to WIPO’s Madrid Protocol on the International Registration of Trademarks in 1995, and the EU joined independently of its Member States in 2004. The Protocol allows trademark holders and applicants in Member States to apply for international protection of their trademarks in other Madrid Protocol jurisdictions on the basis of a single application that relies on the priority date of a domestic trademark (known as the “home application”).

While some EU Member States are signatories to both the Madrid Protocol and Madrid Agreement – thereby broadening options for applicants with national trademark registrations in other Madrid Agreement jurisdictions – neither Britain nor the EU have acceded to the Agreement.

A trademark holder or applicant wishing to use the Madrid Protocol designates all members in which registration of the trademark is sought. The application is lodged with the International Bureau of WIPO, and it is then sent to the designated Madrid Protocol jurisdictions for examination according to their national laws. If one or more of the nominated jurisdictions rejects the application, it can still proceed to registration in other designated jurisdictions in which it passes the examination process. Once registered as a national trademark, it becomes part of the “international registration” that is recorded by WIPO on the International Register of Marks. If the home registration on which an International Registration is based is refused, withdrawn or cancelled, it may be possible

¹⁴⁴ *Community Trademark Regulation*, art 8(4).

to convert the International Registration and the associated applications into national applications in each relevant jurisdiction. Post-Brexit, this process will remain unaffected for British and EUTM applicants/holders wishing to use the Madrid Protocol.

Non-EU EEA nations are not covered by the EUTM, and nor are other non-EU European nations. However, the Madrid Protocol enables a single application to be used to apply for trademark registration in Britain, the EUTM, and some or all of the following non-EUTM European nations: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Georgia, Iceland, Vatican City (including Italy in a Madrid Application enables coverage of Vatican City, which is not part of the EU), Kazakhstan, Liechtenstein, Moldova, Monaco, Montenegro, Norway, Russian Federation, San Marino, Serbia, Switzerland, Turkey, and Ukraine.¹⁴⁵ This enables broad trademark coverage throughout Europe through a single Madrid application. While more complicated than simply registering a EUTM, the Madrid Protocol will therefore continue to offer a path for trademark registrations throughout Europe even if Britain is excised from the EUTM post-Brexit.

v. Ongoing Trademark Harmonization

Within the EU, procedural issues as to how national trademark systems are administered are left to the discretion of Member States, but they have been being gradually harmonized.

A clear example lies in British trademark registration procedure. Until 1 October 2007, the UKIPO persisted with its traditional practice of examining applications for formalities, absolute grounds, and relative grounds before a trademark would proceed to registration. When it changed this practice so that only objections on the basis of formalities and absolute grounds would occur prior to registration (leaving objections on the basis of relative grounds to be made by opponents following publication of the mark in the *Trade Mark Journal*), the British registry fell in line with EUIPO registry practice.

Developments of this nature have gradually consolidated the harmonization of trademark procedure within Europe. While it is likely that existing administrative arrangements would persist for the foreseeable future, it remains to be seen whether the UKIPO's procedures would continue to conform to post-Brexit developments at the EUIPO.

With a view to harmonizing national registry practices further, the EUIPO hosts the European Trade Mark and Design Network ("ETMDN"). It describes its mission as follows:

¹⁴⁵ A full list of Madrid Protocol contracting parties is maintained on the WIPO website, available at http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&se_arch_what=C&treaty_id=8.

“Ever since the OHIM came into being in the mid-90s, it and the EU national offices and BOIP have held annual Liaison Meetings to address trademark and design issues with a view to further harmonization of practices relating to the registration of these rights at the European level. Nevertheless, there are still unnecessary differences of practices that need to be addressed in order to strengthen the trademark and design protection in Europe. It is now time to strive for a maximum level of convergence.”¹⁴⁶

Through its Convergence Program, this voluntary network seeks to establish agreed “Common Practices” in areas in which registry practices have been diverse. It covers areas such as harmonization of trademark classification practice, harmonizing certain absolute and relative grounds for refusal of applications for registration, and the scope of protection given to certain trademarks. It is ongoing work and the Network recognizes: “It is not possible to establish any practice once and for all because the market constantly evolves and the practice has to incorporate all those changes.”¹⁴⁷

Whether Britain will be welcome or willing to continue as a participant in the ETMDN post-Brexit is uncertain.¹⁴⁸ Freedom from EU red-tape has been promoted as one of the reasons for Brexit, and leaders of some other EU nations seem keen to punish Britain if it is not willing to accept all aspects of EU membership.¹⁴⁹ However, trademark applicants and holders – whether from Britain, Europe or the rest of the world – are likely to welcome the efficiencies instigated by the Convergence Program. In this context, it would be unsurprising if the ETMDN were in time to become a supra-EU organization, even if non-EU participants were not granted full membership (e.g. were admitted as observers).

VII. PLANT VARIETIES

The EU’s Regulation on Community Plant Variety Rights (“CPVR Regulation”)¹⁵⁰ provides protection — known as a Community Plant Variety Right or CPVR — for plant varieties

¹⁴⁶ European Trade Mark and Design Network, *Convergence Programme: Programme Brief* (June 21, 2011), at 4, available at, https://www.tmdn.org/network/documents/89965/91990/3-harmonization_programme-v1-1.pdf.

¹⁴⁷ European Trade Mark and Design Network, *Convergence Programme FAQ*, Version 1.2 – 13/03/2012, 7, available at https://www.tmdn.org/network/documents/89965/91990/2-cp_faq.pdf

¹⁴⁸ At the time of writing, there is no reference to ‘Brexit’ on the ETMDN website.

¹⁴⁹ See, e.g., Michael McHugh, *Europe adopting a ‘hardline’ attitude to Brexit Britain, says Martin McGuinness* THE IRISH TIMES (Oct., 18, 2016); Alistair Sloan, *The UK has no choice on ‘hard’ or ‘soft’ Brexit: Brexiteers underestimate the level of spite European negotiators are willing to display*, ALJAZEERA (Oct., 30, 2016) available at, <http://www.aljazeera.com/indepth/opinion/2016/10/uk-choice-hard-soft-brexit-161026065853568.html>.

¹⁵⁰ Council Regulation 2100/94 on Community Plant Variety Rights [1994] OJ L 227/1.

that would be excluded from patentability as biological processes.¹⁵¹ Administered in Angers, France, the Community Plant Variety Office (CPVO) receives applications for CPVR protection (these may also be filed at national offices for forwarding to CPVO) and claims to administer the world's "most extensive system" of plant variety protection.¹⁵²

Since 1995, the CPVR has provided for EU-wide protection that has existed in parallel with national plant variety schemes. Although the systems are not formally harmonized, commentators have noted similarities amounting to "cold harmonization" or "*de facto* harmonization" between European plant variety laws.¹⁵³ Equivalent national rights apply only within the jurisdictions of specific member states, and breeders may select protection under one or the other system.¹⁵⁴

Under the Plant Varieties Act 1997 ("UK"), plant breeders' rights ("PBR") confer protection only within the UK,¹⁵⁵ and plant breeders currently have to choose between obtaining a CPVR or a PBR. Both CPVR and PBRs last for 25 years for most plants, but can extend to 30 years for vines, potatoes and trees.

Unless changes are made to the EU's system, it seems likely that the CPVR will cease to cover Britain post-Brexit, and that plant breeders seeking protection in Britain will need to register separately for PBRs. However, novelty requirements complicate matters, and Brexit may therefore narrow the options for plant breeders.

VIII. GEOGRAPHICAL INDICATIONS (GIs)

Geographical Indications is an area of EU intellectual property law that is related to – but separate from – trademarks. It is also an area in which the EU's views are at significant odds with those of some of its trading partners, such as the US.¹⁵⁶

GIs are signs that identify goods originating from a particular geographical location. They are characterized by reputation, identifiable qualities, manufacturing traditions, or other characteristics that are linked to the geographical area. For example, the GIs

¹⁵¹ *European Patent Convention*, art 53(b).

¹⁵² CPOV, *Protection of new plant varieties in Europe* (2014), at 3, available at http://www.cpvo.europa.eu/documents/brochures/Brochure_EN.pdf.

¹⁵³ Annette Kur and Thomas Dreier, *EUROPEAN INTELLECTUAL PROPERTY LAW: TEXT, CASES AND MATERIALS* (2013), 326.

¹⁵⁴ If a national right has been granted, this becomes ineffective for the duration of a CPVR grant.

¹⁵⁵ *Plant Varieties Act 1997*, §1(1).

¹⁵⁶ See, e.g., Lina Monten, *Geographical Indications of Origin: Should They Be Protected and Why - An Analysis of the Issue from the U.S. and EU Perspectives*, SANTA CLARA COMPUTER & HIGH TECH. L.J. 22, 315 (2005-2006); Tim Josling, *The War on Terroir: Geographical Indications as a Transatlantic Trade Conflict*, 57(3) J. AGRIC. ECON. (2006), 337-363.

“Champagne”, “Parma ham” and “Bordeaux wine” describe products that are recognizable by reference to the European regions in which they were produced.

Protection for GIs is required by the Paris Convention,¹⁵⁷ the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration 1958, and by the TRIPS Agreement.¹⁵⁸ However, GI protection is fragmented within the EU:¹⁵⁹ producers can register for unitary protection and/or for national protection, and geographical designations for non-agricultural products are only protected in some jurisdictions.

Since 1993, GIs for agricultural products and foodstuffs have been granted unitary EU protection under the Protected Food Name scheme. This system gradually developed through a series of measures granting protection to wines,¹⁶⁰ spirits,¹⁶¹ aromatized wines,¹⁶² and other agricultural products and foodstuffs.¹⁶³ Within this system, GIs for agricultural products and foodstuffs from a particular area are known as Protected Designations of Origin (“PDOs”),¹⁶⁴ while those closely linked to an area are Protected Geographical Indications (“PGIs”).¹⁶⁵ The designator Traditional Specialty Guaranteed (“TSG”) refers to items with a traditional character, either because of their method of production or their composition. GIs for wines and spirits are dealt with under separate provisions.¹⁶⁶

To register a GI, EU producers apply to a national authority that examines the specifications. If passed, these are forwarded to the Council for scrutiny. Non-EU producers submit an application either via a national authority in their country of origin or directly to the Council. If passed, the GI is published in the Official Journal. If no

¹⁵⁷ *Paris Convention*, *supra* note 82, art. 10, 10*ter*.

¹⁵⁸ *TRIPS*, *supra* note 9, art. 22-24 (although note that Article 24 includes provisions allowing for the continued use in some circumstances of terms that might otherwise be considered GIs).

¹⁵⁹ For an overview of the EU GI framework, see Matteo Gragnani, *The Law Of Geographical Indications in the EU*, 7(4) *J. INTELL. PROP. L. PRAC.* (2012), 271-282.

¹⁶⁰ Council Regulation (EC) No 491/2009 of 25 May 2009 amending Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products [2009] OJ L 154.

¹⁶¹ Regulation (EEC) No 1576/89 of 29 May 1989 laying down general rules on the definition, description and presentation of spirit drinks [1989] OJ L 160.

¹⁶² Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91 [2014] OJ L 84.

¹⁶³ Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs [2012] OJ L 343/1.

¹⁶⁴ The production, processing and preparation must entirely take place in the geographical area.

¹⁶⁵ Either the production, processing or preparation stage of production must take place in the geographical area.

¹⁶⁶ Regulation (EC) No 479/2008 on the common organisation of the market in wine and Regulation (EC) No 110/2008 on the definition, description, presentation, labelling and protection of geographical indications of spirit drinks [2008] OJ L 39/16.

successful opposition is filed, the GI proceeds to registration. The Database of Origin Registration (“DOOR”) is a register of EU GIs.¹⁶⁷ Under the 2003 Customs Regulation,¹⁶⁸ goods bearing false GIs may be seized on import into the EU.

As PDOs, PDIs and TSGs are based on EU rules, it is expected they would cease to apply in Britain following Brexit, but would continue to apply throughout the remaining EU Member States. In response to Brexit, the British government may decide to introduce a national “scheme of origin” for protection of these types of GIs.

Non-agricultural products have not yet been protected by the EU’s unitary system and national frameworks vary considerably within Europe, albeit guided by the minimum standards required by the TRIPS Agreement. The Council has therefore been considering whether to expand harmonized GI protection to non-agricultural products.¹⁶⁹ Domestic legislation in many EU Member States – including *sui generis* legislation in Britain to protect “Harris Tweed”¹⁷⁰ – already contains some such provisions, although the protection offered can be piecemeal and incomplete.

In Britain, the doctrine of “extended” passing off can be used to protect such collective goodwill¹⁷¹ for agricultural and non-agricultural products alike. Registered trademarks may also offer protection in some circumstances (e.g. it may be possible to register a “collective trademark”), and unfair trading laws also offer some protection. Brexit is unlikely to have an impact on the operation of these laws, but Britain will presumably be left outside any future harmonization of non-agricultural GIs that is rolled out across the EU.

IX. SEMICONDUCTOR TOPOGRAPHIES

Topographies (i.e. layout of circuitry elements) of semiconductor computer chips – aka microchips, silicon chips, and integrated circuits – receive separate protection under EU

¹⁶⁷ Database of Origin Registration, available at <http://ec.europa.eu/agriculture/quality/door/list.html;jsessionid=pL0hLqqLXhNmFQyFl1b24mY3t9dJQPflg3xbL2YphGT4k6zdWn34!-370879141>.

¹⁶⁸ Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights [2003] OJ L 196.

¹⁶⁹ European Commission, *Green Paper on the protection of geographical indications for non-agricultural products – Frequently Asked Questions* (MEMO/14/486, 15/07/2014), available at http://europa.eu/rapid/press-release_MEMO-14-486_en.htm?locale=en.

¹⁷⁰ *Harris Tweed Act 1993*.

¹⁷¹ See, e.g., *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2013] EWHC 630 (Ch) (26 March 2013), upholding a claim for collective goodwill in ‘Greek yoghurt’.

law.¹⁷² This was the EU's first harmonization Directive in the field of intellectual property and Member States were required to incorporate compliant domestic law by late 1987.

Application of the requirement was fragmented. The majority of European countries require registration to obtain protection, but some adopted unregistered copyright-like rights.¹⁷³ In Britain, this is the "semiconductor design right".¹⁷⁴

Protection of a semiconductor chip covers its topographical layout, including preparatory materials such as drawings of the layout. Other features (such as technical function or arrangements) are excluded. Only chip topography that is "the result of its creator's own intellectual effort and is not commonplace in the semiconductor industry"¹⁷⁵ will be protected.

The rights holder gains the exclusive right to authorize or prohibit the reproduction, commercial exploitation, and importation of the topography¹⁷⁶ for 10 years from the date of first protection, or 15 years from the date of creation if the chip has not been registered or commercial exploited. Remedies for infringement vary widely across the EU,¹⁷⁷ and few disputes have been litigated.¹⁷⁸

As these rights are national, Brexit is likely to have relatively little practical impact on semiconductor topography rights within Europe.

X. TRADE SECRETS

The EU's Trade Secrets Directive came into force on 5 July 2016.¹⁷⁹ The Directive's goal was to standardize the EU Member States' diverging national laws protecting against misappropriation of trade secrets, and it was unanimously adopted by the Council.

¹⁷² Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products [1987] OJ L 24; See also 94/824/EC: Council Decision of 22 December 1994 on the extension of the legal protection of topographies of semiconductor products to persons from a Member of the World Trade Organization [1994] OJ L 349 and 96/644/EC: Council Decision of 11 November 1996 on the extension of the legal protection of topographies of semiconductor products to persons from the Isle of Man [1996] OJ L 293. This complies with the TRIPS Agreement's requirements in Articles 35-38.

¹⁷³ Britain, Ireland and Belgium.

¹⁷⁴ See *Copyright Designs and Patents Act* 1988, Part III, as modified by the *Design Right (Semiconductor Topographies) Regulations* 1989. This scheme replaced the *sui generis* "topography right" established by the earlier *Semiconductor Products (Protection of Topography) Regulations* 1987.

¹⁷⁵ Council Directive 87/54/EEC of 16 December 1986, Art 2(2).

¹⁷⁶ *Id.* at art 5.

¹⁷⁷ Thomas Hoeren, *Chip Protection in Europe* in *THE LAW OF INFORMATION TECHNOLOGY IN EUROPE* (Alfred P. Meijboom and Corien E. J. Prins, eds., 1991), 137–152, 147.

¹⁷⁸ Annette Kur and Thomas Dreier, *supra* note 153, 377.

¹⁷⁹ Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful

Following its entry into force, Member States were allowed two years in which to incorporate the Directive's provisions into their domestic laws. This means the deadline falls less than a year before Brexit is expected to occur.

Particularly as Britain's existing law is largely compliant with the Directive's requirements, it remains to be seen whether Britain will take further steps to give effect to the Directive's provisions during the negotiation period prior to Brexit.

Meanwhile, the Directive will provide more clarity for businesses operating in the remainder of the EU, and businesses operating in Britain will continue to be able to use contract law and the broad protections conferred by the equitable doctrine of "breach of confidence" to protect their trade secrets.

XI. INTELLECTUAL PROPERTY PRACTICE ISSUES

While uncertainty prevails as to the likely substance of intellectual property laws in Britain post-Brexit, practical use of intellectual property rights will also be affected, as outlined in this section.

i. Dealings

Brexit is likely to impact many intellectual property agreements, such as licenses and assignments. If the EU is specified as a/the territory covered by an agreement, intellectual property rights holders may need to re-negotiate to ensure that their agreement continues to operate as originally intended and cover Britain.

ii. Competition Law

After Brexit, Britain will no longer be subject to the EU's competition laws. This may also have an impact on the effect of intellectual property agreements.

iii. Licensing of Intellectual Property Practitioners

Brexit raises concerns about whether intellectual property practitioners will be able to continue practicing seamlessly between Britain and the EU.

The Lawyers' Services Directive¹⁸⁰ and the Lawyers' Establishment Directive¹⁸¹ currently enable British lawyers to practice and work in other parts of the EU, and vice versa. This arrangement also ensures that issues such as legal professional privilege carry across the

acquisition, use and disclosure (Trade Secret Directive), OJ L 157, 15.6.2016, p. 1–18.

¹⁸⁰ Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, Official Journal L 078 , 26/03/1977 P. 0017 – 0018.

¹⁸¹ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77, 14.3.1998, p. 36–43.

EU's internal borders. It is unclear what the implications of Brexit on cross-border practising rights will be, though they are likely to affect lawyers equally, regardless of practice area. The international commercial appeal of the law of England and Wales may increase the chances that the EU will be keen for its lawyers to continue to be able to practice in Britain (and particularly in the legal hub of the City of London), in which case the inter-jurisdictional practicing rights granted would probably be reciprocal.

Patent and trademark attorneys are licensed professionals. At present, British patent and trademark attorneys can conduct work (e.g. registration applications, oppositions and appeals) before the UKIPO and European intellectual property registries. The British Chartered Institute of Patent Attorneys has announced it “will work with the UK Government and other interested parties to ensure that as many of these rights as possible are retained after exit from the EU.”¹⁸² It would similarly be in the interests of EU-registered patent and trademark attorneys to be able to continue working before the UKIPO.

In any event, many British patent attorneys are also qualified European Patent Attorneys, and they will continue to be able to conduct work before the intellectual property registries of EU Member States, as well as the EPO and EUIPO. Britain is a contracting party to the EPC, so it would seem likely that British patent professionals will remain eligible to qualify as European Patent Attorneys post-Brexit.

iv. Enforcement

Brexit will affect the enforcement of intellectual property rights. It is not yet clear how great the impact will be, but it seems likely that Britain will become less attractive as a venue for intellectual property litigation if orders of British courts will no longer apply across the EU.

One important enforcement consideration for intellectual property rights holders is that of customs seizures. When movements of counterfeit and other infringing goods are expected to cross EU borders, rights holders can currently notify EU customs authorities and ask them to seize those goods at the border.¹⁸³ Following Brexit, it may be necessary to register rights independently with HM Revenue & Customs, thus requiring rights holders to seek assistance separately from the EU customs authorities and the British Border Force.

¹⁸² Cipa, *The Impact of Brexit on Intellectual Property* (Aug., 21 2016): *available at* <http://www.cipa.org.uk/policy-and-news/briefing-papers/the-impact-of-brexit-on-intellectual-property/>.

¹⁸³ Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003; OJ L 181, 29.6.2013, 15–34.

When litigating, it is currently possible for a rights holder to obtain a judicial order (e.g. an injunction) with pan-European effect from a British or other EU court. While general international law principles governing the enforcement of foreign judgments should allow for British and EU courts to continue to be able enforce each other's orders with respect to intellectual property following Brexit, the extent to which this is likely to occur in practice remains to be seen. For rights holders, relying on the hope of cross-jurisdictional enforcement may constitute an unacceptable risk, and – despite the greater expense, duplication and inconvenience associated with replicating actions in different jurisdictions – business may prefer the certainty associated with obtaining orders specifically covering each jurisdiction. Such considerations could affect existing orders, as well those sought in the future.

Post-Brexit, it is likely that separate EU and British trademark and design registrations will mean that, instead of litigating in a single jurisdiction to enforce their rights across Europe, separate actions will be needed in the EU and Britain to comprehensively enforce rights.

Whereas there has been significant movement towards single EU-wide patent enforcement actions, uncertainty as to the fate of the proposed UPC means it may continue to be necessary to take separate actions in Britain and each affected EU Member State post-Brexit. This would be a disappointment to many patent holders, given the well-publicized problems that had been motivating movement towards a single patent jurisdiction for EU Member States.¹⁸⁴

Uncertainty about litigation outcomes and the cross-jurisdictional enforceability of judgments in the wake of Brexit may increase the appeal of arbitration. Arbitration awards are enforceable throughout Britain and the EU (and 156 states worldwide) by virtue of the UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).¹⁸⁵ If Brexit makes litigation of European intellectual property disputes too costly, difficult or uncertain, or otherwise too complicated to negotiate, arbitration may become an increasingly attractive option.

¹⁸⁴ See, e.g., discussions in: Christopher J. Harnett and Amanda F Wieker, *The EU Unitary Patent and Unified Patent Court: Simplicity and Standardization, Challenge, and Opportunity*, 25(4) INTELL. PROP. TECH. L. J. (2013), 15-18; Jens Schovsbo, Thomas Riis and Clement Petersen, *The Unified Patent Court: Pros and Cons of Specialization – Is There a Light at the End of the Tunnel (Vision)?* IIC Max Planck Institute for Innovation and Competition, (2015), 46, 271–274; Aurora Plomer, *A Unitary Patent for a (Dis)United Europe: The Long Shadow of History*, IIC (2015) 46, 508–533; Jochen Pagenberg, *Unitary patent and Unified Court — What lies ahead?* 8(6) J. INTELL. PROP. L. PRAC. (2013), 480-485.

¹⁸⁵ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) (the "New York Convention").

XII. CONCLUDING REMARKS

The clichéd exhortation to “keep calm and carry on”¹⁸⁶ was developed as British government propaganda during World War II. It appeals to national pride and a sense of quiet strength in adversity,¹⁸⁷ and it seems sensible advice in light of some of the panic that followed the Brexit referendum outcome.

The vote for Brexit and freedom from the EU has been (at least in part) attributed to a desire to assert British identity and independence.¹⁸⁸ EU leaders have responded with uncompromising messages that Britain will not be allowed to pick and choose which parts of the EU’s laws it wishes to continue to engage with post Brexit, and that “out means out”.¹⁸⁹ Such polarized positions are contributing to uncertainty about how Brexit will affect intellectual property laws and interests.

In this environment, intellectual property holders may be prudent to follow the old British adage, and to keep calm and carry on, reassured by reasoning that interdependence would be the optimal outcome for both Britain and the EU with respect to intellectual property. Despite the posturing and tough talk, and even if it means swallowing some pride, it seems unlikely that either the EU negotiators or the British government would ultimately allow a situation to develop in which intellectual property rights holders would lose existing protection due to Brexit. It also seems unlikely that they would allow hard won efficiencies in the intellectual property system to be significantly unravelled. To do so would surely come at too great a cost to both the EU and Britain as business destinations.

Intellectual property rights are more useful and attractive to users if they cover territories with larger populations and economies, and if they are administratively straightforward to negotiate. Maintaining the EU’s intellectual property *acquis*’ influence over British territory means it would reach over 65 million extra people, or an additional 13% population, than if Britain were to be cast adrift. It would also be more streamlined and cost efficient for users than having to negotiate two systems. Conversely, for both the EU and Britain, divorcing their intellectual property systems from each other would weaken

¹⁸⁶ Interestingly, this slogan has been registered as a US and UK trademark and as a EUTM by multiple unrelated entities with respect to a vast array of goods.

¹⁸⁷ Owen Hatherley, *Keep Calm and Carry On – the sinister message behind the slogan that seduced the nation*, THE GUARDIAN (8 January 2016), available at <https://www.theguardian.com/books/2016/jan/08/keep-calm-and-carry-on-posters-austerityubiquity-sinister-implications>.

¹⁸⁸ While it is too soon for historical analyses, see, e.g., Media Commentary On The Referendum Result: Fraser Nelson, *Brexit: A Very British Revolution*, WALL ST. J. (June 24, 2016), available at <http://www.wsj.com/articles/brexit-a-very-british-revolution-1466800383>.

¹⁸⁹ The “out means out” comment was made by the European Commission president, Jean-Claude Juncker, in an interview with a German newspaper: Kai Diekmann and Dirk Hoeren, *European Commission President: This is not the beginning of the end of the EU*, BILD (24 June 2016), available at <http://www.businessinsider.com/jean-claude-juncker-interview-brexit-2016-6?IR=T>.

their appeal to users, and undermine their competitiveness with other jurisdictions around the world.

In a region that is so dependent on investment and trade in intellectual property, both the EU and British economies are likely to benefit from continuing to harmonize their intellectual property laws in the future, from sharing intellectual property registries, and from sharing courts. If this soft Brexit approach is followed with respect to intellectual property, and if Britain continues to operate within – or in close cooperation with – the EU intellectual property *acquis*, it should reduce the “red tape” involved with establishing and enforcing intellectual property interests both in Britain and the EU. This would strengthen the attractiveness of Europe generally as a target for investment in intellectual property and its related industries.

By contrast, removing Britain from the harmonization project’s operation and leaving the two parties to go their separate ways with respect to intellectual property would reduce efficiencies, particularly for holders of registered trademarks, patents and designs. It would also complicate enforcement actions for rights holders with interests in both Britain and the EU.

If long-term pragmatism prevails over short-term pride, and if decisions about intellectual property are determined on their merits, it therefore seems likely that intellectual property arrangements will be negotiated so that they can continue much as they have in recent years. Post-Brexit, such mutually beneficial interdependence would arguably produce the best commercial outcomes for the EU and Britain alike.