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# THE UK AFTER BREXIT

Legal and Policy Challenges

*Edited by*  
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## The UK after Brexit. Legal and Policy Challenges

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## 1. INTRODUCTION

The effect of European Union law on intellectual property (IP) law in the United Kingdom has been profound. There is no area of IP law that does not feature EU legislation or CJEU case law. In fact, it may be the most ‘Europeanised’ area of private law.<sup>1</sup> For this reason, ‘Brexit’ will undoubtedly have a massive impact on the current IP framework in the UK. A clear picture of the post-Brexit IP landscape, however, can only be drawn once we know the outcome of the negotiations pursuant to the Article 50 TEU procedure. Our intention with this chapter is to give an overview of the current state of play in terms of EU law’s impact on IP law, and to consider the most likely outcome of Brexit on IP law in the UK.

At the outset, we must emphasise that the United Kingdom’s ‘exiting’ of the European Union will primarily affect IP laws, currently valid in the UK, that derive from EU measures. Long before the UK joined the then European Economic Community (EEC) in 1973 it had established its own national jurisdiction to grant, for example, trade marks and patents, and it will continue to possess this jurisdiction, post-Brexit. Moreover, the UK can claim an indigenous tradition of copyright legislation going back to the Statute of Anne in 1710. Finally, the UK is a signatory to several measures which have been negotiated and agreed outside of the European Union, and which need to be distinguished from EU measures. For instance, there is the UPOV Convention establishing a *sui generis* right for plant varieties, as well as the European Patent Convention (EPC) which provides for a centralised system for granting European patents (EPs). These measures operate outside the ambit of the European Union and Brexit will not directly affect the UK’s involvement in these measures. With this chapter, we aim to explain what areas *will* be affected by Brexit, and which ones will not.

## 2. THE INTEGRATION OF EUROPEAN IP LAW

The Europeanisation of intellectual property via EU law is a history of ever-growing integration. Yet, the Treaty of Rome did not bestow any relevant legislative competence to the European Economic Community (EEC). The Treaty rather stipulated that what would become EU law would not ‘prejudice the system existing in Member States in respect of property’ within its Article 222.<sup>2</sup> This meant that efforts to harmonise national IP laws in Europe took place at

<sup>1</sup> J PILA, ‘Intellectual Property as a Case Study in Europeanization: Methodological Themes and Context’ in A OHLY and J PILA (eds), *The Europeanization of Intellectual Property Law*, Oxford University Press, Oxford 2013, p 3.

<sup>2</sup> Additionally, Article 36 states that the protection of industrial and commercial property could be regarded as exceptions for the prohibition of restrictions to the freedom of movement of goods.

the international level through multilateral measures.<sup>3</sup> One such measure was the Community Patent Convention of 1975 which was devised as a special agreement between Member States of the then EEC.<sup>4</sup>

The European Court of Justice, however, perceived that national rules for IP protection and their discrepancies were capable of creating obstacles to fundamental principles of the EEC Treaties, like freedom of movement of goods or competition.<sup>5</sup> Thereafter the scope for scrutiny under rules of the Treaty was enabled by distinguishing between the existence of IP rights which were governed by national law and their exercise, thus delineating the future relationship between EU law and national IP rights.<sup>6</sup> In due course, the exercise of IP rights would fall under the shared scrutiny of the Union and Member States.<sup>7</sup> Initially, it was perceived that national rules on intellectual property would conflict with the competition rules in the Treaty,<sup>8</sup> as early cases indicated.<sup>9</sup> The focus, however, soon shifted to the adverse effects of intellectual property rights on the free movement of goods which led to the development of the rules on exhaustion of IP rights by the CJEU.<sup>10</sup>

Additionally, the discrepancies between Treaty principles and national IP rights led the European Commission to harmonise national IP laws via Directives based on Article 114(1) TFEU and its predecessor,<sup>11</sup> which provided that the Union may provide legislation for the establishment and functioning of the internal market.<sup>12</sup> Directives have been used to harmonise national IP laws on trade marks, copyright (and related rights), registered designs and, in the patent area, with regards to biotechnology inventions.<sup>13</sup>

<sup>3</sup> G TRITTON, *Tritton on Intellectual Property in Europe*, 4th edn, Sweet & Maxwell, London 2014, para 1-039.

<sup>4</sup> While the Convention never came into force, its provisions were used as templates for national patent laws (see eg UK Patents Act 1977, section 130(7)); 'Resolution on the Adjustment of National Patent Law Records of the Luxembourg Conference on the Community patent 1975' in *Records of the Luxembourg Conference on the Community Patent 1975* (Office for Official Publications of the European Communities, 1982) p 332.

<sup>5</sup> Case 24/67, *Parke, Davis and Co v Probel, Reese, Beintema-Interpharm and Centrafarm*, ECLI:EU:C:1968:11, 55, 71.

<sup>6</sup> TRITTON, above n 3, para 1-039.

<sup>7</sup> PILA, above n 1, p 10.

<sup>8</sup> P GROVES, T MARTINOI, C MISHKIN and J RICHARDS, *Intellectual Property and the Internal Market of the European Community*, Graham & Trotman, London 1993, p 5; TRITTON, above n 3, para 1-039.

<sup>9</sup> See eg Case 56 and 58/64, *Consten SaRL and Grundig Verkaufs GmbH v Comm*, ECLI:EU:C:1966:41; *Parke, Davis and Co v Probel, Reese, Beintema-Interpharm and Centrafarm*, above n 5.

<sup>10</sup> TRITTON, above n 3, para 1-039.

<sup>11</sup> Article 100 EEC; Article 95 EC.

<sup>12</sup> Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union*, ECLI:EU:C:2000:544, paras 83–84.

<sup>13</sup> UK adoption of a Directive with regard to trade secrets was envisaged in 2017–18 but the UK may not bring it into force if Brexit occurs: <[http://ec.europa.eu/growth/industry/intellectual-property/trade-secrets\\_en](http://ec.europa.eu/growth/industry/intellectual-property/trade-secrets_en)>.

These efforts to harmonise national IP laws have additionally been supplemented by unitary EU wide rights through regulations.<sup>14</sup> Such measures were initially based on Article 352 TFEU<sup>15</sup> which required a unanimous vote of the Council. The inception of the Lisbon Treaty introduced Article 118 TFEU which allows the introduction of EU-wide IP rights. Currently, there are EU Regulations with regards to EU trade mark rights, registered and unregistered Community design rights, protected geographical indications and protected designations of origin, Community plant variety rights and supplementary protection certificates (SPCs).

One final thing is worth noting: the impact of EU law on national IP rights varies from right to right. The effect on design and trade mark law has been profound since both areas have been harmonised via Directives and the creation of unitary rights. Copyright law has fared less harmoniously but the impact has still been considerable. Patents were, for many years, the least affected IP right, but over the past two decades there has been a dramatic increase in patent-related EU legislation, culminating in the Regulation on the European patent with unitary effect.

The future framework of intellectual property law in the UK will depend on the kind of Brexit that will occur. A so-called hard Brexit, which currently appears to be the UK government's line, would sever all links with the EU *acquis*. However, the February 2017 Government's White Paper on the Great Repeal Bill states that 'historic CJEU case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court.'<sup>16</sup> The malleability of the common law system will enable UK courts to continue to apply EU-derived principles like 'intellectual creation' within UK copyright law until new UK legislation provides otherwise. However, any future CJEU case law would not have to be followed, though it can be anticipated that UK courts would find CJEU judgments persuasive, similar to the current practice with regards to the decisions of the EPO Board of Appeals.<sup>17</sup> 'Soft Brexit', ie where the UK stays within the European Economic Area (EEA), would mean that much of EU IP Law would remain valid.

## 2.1. TRADE MARKS

Of all IP rights, EU law has had the most profound impact on trade mark law. The activity by the Union in this field of IP can be explained by the Union's goal

<sup>14</sup> T COOK, *EU Intellectual Property Law*, Oxford University Press, Oxford 2010, para 1.06.

<sup>15</sup> Previously: Article 308 EC; Article 235 EEC.

<sup>16</sup> Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (Cm 9446, March 2017), para 2.16.

<sup>17</sup> *Conor v Angiotech* [2008] UKHL 49; *Human Genome Sciences v Eli Lilly* [2011] UKSC 51. See further the contribution by T HORSLEY (Ch 4) in this edited collection.

to establish a single market.<sup>18</sup> Trade marks became a prime harmonising area in the context of marketing goods and services throughout the single market.<sup>19</sup> In 1989 the first Trade Marks Directive was brought forward with the aim of harmonising trade mark law within EU Member States.<sup>20</sup> The United Kingdom implemented the Directive with the UK Trade Marks Act 1994.

The EU, however, considered that the mere approximation of national laws would not eliminate the barriers of territoriality.<sup>21</sup> To ensure the free movement of branded goods the Community Trade Mark was initiated by the European Commission.<sup>22</sup> The Community Trade Mark Regulation created a unitary right – the Community Trade Mark – which would be valid in all EU Member States. Following the entry in force of the Lisbon Treaty in 2009, the Community Trade Mark Regulation was substituted with the EU Trade Mark Regulation and Community Trade Marks were relabelled as EU Trade Marks.

### 2.1.1. *EU Trade Marks and CJEU Jurisprudence*

EU Trade Marks are granted by the EU IP Office (formerly, the Office for the Harmonisation in the Internal Market, OHIM) in Alicante. The EU Trade Mark has unitary effect in all EU Member States and can only be assigned and licensed as a whole.<sup>23</sup> The enforcement of such EU Trade Marks is conducted by national courts as courts of the EU with the possibility of the General Court and the European Court of Justice being involved. Indeed, the majority of cases of the CJEU in the field of intellectual property law are trade mark cases.<sup>24</sup>

European courts are directly involved in the adjudication of EU Trade Marks stemming from appeals from the EUIPO. In addition, national courts frequently seek CJEU guidance on interpreting provision deriving from the TM Directive through preliminary rulings pursuant to Article 267 TFEU. The fact that the substantial provisions of both the Directive and Regulation correspond to one another makes case law based on the Directive relevant for the interpretation

<sup>18</sup> TRITTON, above n 3, para 3-035.

<sup>19</sup> A VON MÜHLENDahl, D BOTIS, S MANIATIS and I WISEMAN, *Trade Mark Law in Europe*, 3rd edn, Oxford University Press, Oxford 2016, para 2.07.

<sup>20</sup> First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks [1989] OJ L40.

<sup>21</sup> Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark [2009] OJ L78/1, Recital 4.

<sup>22</sup> Memorandum on the Creation of an EEC Trade Mark, Bulletin of the European Communities, Supplement 8/76, para 34.

<sup>23</sup> Article 1(2) Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark [2009] OJ L78/1.

<sup>24</sup> G DINWOODIE, 'The Europeanisation of Trade Mark Law' in OHLY and PILA, above n 1, p 91.

of provisions of the Regulation and vice versa, thus increasing the harmonising effect.<sup>25</sup>

In practice, the decisions of the European courts on trade mark matters have not always been welcomed by national courts. Some UK IP practitioners and judges consider that the European Courts, as generalist courts, do not have the expertise to decide on a complex, specialist matter like trade mark law. UK judicial discontentment can be seen with the High Court decision, following a CJEU reference, in *Arsenal v Reed* (2002)<sup>26</sup> and similarly, at the Court of Appeal level in *L'Oréal v Bellure* (2009).<sup>27</sup> Central to the *L'Oréal* case was the question of whether Bellure was taking unfair advantage of the reputation or the distinctiveness of L'Oréal's marks. The CJEU held that this would occur when the alleged infringer was 'riding on the coattails' of the famous mark, noting that such use of the mark would be uncompensated. The CJEU's interpretation of the respective provisions left the UK courts with no other avenue but a finding of infringement, despite concerns about the wider impact of the decision. Indeed, the CJEU's de facto extension of trade mark protection to the wider 'brand' has received substantial academic criticism.<sup>28</sup>

### 2.1.2. *The Impact of Brexit*

Article 1(2) of the EU Trade Mark Regulation prescribes that the unitary character of the EU Trade Mark shall have equal effect within the Union. A hard Brexit will mean that EU trade marks granted by the EUIPO will have no effect within the United Kingdom. The impact of this will be significant. Currently, there are millions of EU Trade Marks registered at the EUIPO. Moreover, the United Kingdom had, along with Germany, the highest number of applications of EU Trade Marks in the year 2015 according to Eurostat.<sup>29</sup> The fate of these registrations remains unclear and would largely depend on any agreement between the UK and the remaining EU Member States. In August 2016, the Chartered Institute of Trade Mark Attorneys (CITMA) provided a list of seven options that could apply post-Brexit.<sup>30</sup>

<sup>25</sup> R ARNOLD, 'An Overview of European Harmonization Measures in Intellectual Property Law' in OHLY and PILA, above n 1, p 31.

<sup>26</sup> Case C-206/01, *Arsenal Football Club plc v Matthew Reed*, ECLI:EU:C:2002:651.

<sup>27</sup> Case C-486/07, *L'Oréal SA v Bellure NV*, ECLI:EU:C:2009:378.

<sup>28</sup> See eg D GANGJEE and R BURELL, 'Because You're Worth It: L'Oréal and the Prohibition on Free Riding' (2010) 73 *Modern Law Review* 282–304; and L MCDONAGH, 'From Brand Performance to Consumer Performativity: Assessing European Trade Mark Law after the Rise of Anthropological Marketing' (2015) 42 *Journal of Law and Society* 611–636.

<sup>29</sup> <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Intellectual\\_property\\_rights\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Intellectual_property_rights_statistics)>.

<sup>30</sup> <[https://www.citma.org.uk/membership/eu\\_resources/eu\\_brexit/eu\\_registered\\_rights\\_-\\_trade\\_marks](https://www.citma.org.uk/membership/eu_resources/eu_brexit/eu_registered_rights_-_trade_marks)>.

The *Jersey option* provides that the UK would unilaterally declare EU Trade Marks to have effect within the territory of the United Kingdom through an accompanying piece of legislation. This effect would be acknowledged by both the UK Intellectual Property Office (UK IPO) and UK courts. The *UKplus option* foresees an amendment of Article 1(2) of the EU Trade Mark Regulation. Rather than extending to the territories of Union Member States the effect of such a trade mark would extend to the UK and potentially other non-EU European Countries. The *Montenegro option* envisages that all existing EU Trade Mark registrations would be entered automatically entered within the UK's trade mark register. The *Tuvalu model* follows basically the Montenegro model with the distinction that registration of the EU Trade mark in the UK registry would be dependent on the owner's positive decision to extend the protection to the UK. The *Veto model* resembles the Tuvalu option but provides the UK IPO with the option to refuse registration of the mark in question. The *Republic of Ireland option* provides EU Trade Mark owners with the option to create a corresponding UK trade mark registration when renewing the registration at the EUIPO or another cut-off date after Brexit. Finally, the *Conversion model* would replicate the currently used system that applies where current EU Trade Marks are converted into national trade mark registrations.<sup>31</sup> This is, for instance, done where an application for an EU Trade Mark is not possible because of an earlier right in just one EU Member State prohibiting registration with an EU Trade mark with unitary effect. With regard to applying this framework to the post-Brexit scenario, applications would undergo full examination but would be able to retain their initial priority date at the EUIPO.

'Hard Brexit' would mean that national trade mark law (statutory provisions) would not have to be amended. The proposed Great Repeal Bill would mean that the current statutory trade mark law would remain as it is but Parliament would be able to amend the law as it sees fit. Importantly, however, the link to the EU *acquis* and the adjudication of the CJEU would be severed. By contrast, 'Soft Brexit' and EEA membership would not change much with regard to UK trade mark law as the Trade Marks Directive would still apply. It is as yet unclear as to which option will be taken. The current UK White Paper on the Great Repeal Bill states that the case law of the CJEU prior to Brexit will have the same status as UK Supreme Court cases within the UK legal system,<sup>32</sup> but subsequent case law of the CJEU would no longer be binding on the UK.

<sup>31</sup> Articles 112–114 EU Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark [2009] OJ L78/1.

<sup>32</sup> *Legislating for the United Kingdom's withdrawal from the European Union*, above n 16.



## 2.2. DESIGNS

As with trade mark law, design law in the UK is heavily influenced by EU law. However, design protection is multi-layered: designs can be protected through registration at the EU or UK levels; but protection is also available through unregistered design rights, again at both the EU and UK levels. Unitary EU rights are available for registered and unregistered designs (ie Community registered designs and Community unregistered designs), with registrations occurring at the EUIPO.<sup>33</sup> National laws in EU Member States with regard to registered rights were harmonised through the Design Directive<sup>34</sup> which was implemented in the UK through an amendment of the Registered Designs Act 1949. The Directive, however, left the regime of national unregistered design rights untouched.<sup>35</sup> UK unregistered designs are legislated within Part III of the Copyright, Design and Patents Act 1988 (CDPA 1988). This somewhat complex framework of design protection<sup>36</sup> means that only the law of registered designs is fully Europeanised, and the rules for EU and national unregistered designs can vary.

The parallel to the situation under trade mark law means that similar considerations and options for the post-Brexit scenario are relevant for the protection of Community registered designs. Hence, CITMA have put forward a similar scenario to the one outlined above for trade marks with regards to registered EU designs.<sup>37</sup> The situation is, however, different for unregistered Community designs, where the right subsists automatically when it is first made available in the EU.<sup>38</sup> Post-Brexit, an EU unregistered design right could in theory be accepted as a UK unregistered design right. There are difficulties with this, however, due to differences between the regimes of protection of unregistered designs in the EU and the UK. For instance, the UK right lasts significantly longer (15 years in comparison to three years), and contrary to the unregistered Community design, its UK counterpart does not protect surface decoration.<sup>39</sup> Therefore, further considerations will be required in this field to develop adequate post-Brexit protection.

<sup>33</sup> Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2002] OJ L3/1.

<sup>34</sup> Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs [1998] OJ L289.

<sup>35</sup> Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs [1998] OJ L289, Recital 7.

<sup>36</sup> This complexity is raised by the fact that copyright protection may additionally be available: see M HOWE (ed), *Russel-Clarke and Howe on Industrial Designs*, 9th edn, Sweet & Maxwell, London 2016, para 1-001.

<sup>37</sup> <[https://www.citma.org.uk/membership/eu\\_resources/eu\\_brexit/eu\\_registered\\_rights\\_-\\_designs](https://www.citma.org.uk/membership/eu_resources/eu_brexit/eu_registered_rights_-_designs)>.

<sup>38</sup> Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2002] OJ L3/1. Article 11(1).

<sup>39</sup> Copyright, Designs and Patents Act 1988, section 213(3)(c).

### 2.3. GEOGRAPHICAL INDICATIONS

A related field to IP is the protection provided to geographical indications and designations of origin. These two fields aim to protect agricultural products and foodstuffs manufactured within a certain locality which possess certain characteristics. Both of these measures are currently based on an EU Regulation.<sup>40</sup> The protection is granted, inter alia, against any false or misleading use of the indication.<sup>41</sup> Products such as Champagne, Roquefort cheese, Bavarian Beer and Parma ham are protected by these measures. The UK currently has several products registered under this framework such as Welsh Lamb, Stilton Blue and White Cheeses, Cornish Pasties and the Melton Mowbray Pork Pie.<sup>42</sup>

After Brexit, neither Protected Geographical Indications (PGI) nor Protected Designations of Origin (PDOs) would have effect in the United Kingdom (similar to the situation with EU Trade Marks). This has led to fears that British producers could be free to use previously protected names.<sup>43</sup> Already registered UK products, however, would ironically not lose their registration as PGIs or PDO in the EU. This is because the framework established by the Regulation is open for products from non-EU Member States.

A form of supplementary protection in this area could be provided by the law of passing off (an aspect of the law of torts). This would bring the UK back to the situation prior to the introduction of the Regulation on PGIs and PDOs, whereby an extended form of passing off allowed groups of producers to file an action against misrepresentation by other traders. For instance, the producers of Champagne, that were entitled to use the term under French law, were able to successfully take action in the UK against producers labelling their beverage Spanish Champagne.<sup>44</sup>

Nevertheless, passing off would not provide the same level of protection as the current system. GIs provide protection not just against confusingly similar designations but also where association is merely evoked. Conversely, a successful claim of passing off would need to demonstrate a misrepresentation, and that consumers would rely on such misrepresentation when purchasing the

<sup>40</sup> Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [2006] OJ L93/12.

<sup>41</sup> Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [2006] OJ L93/12, Article 13(1).

<sup>42</sup> <<https://www.gov.uk/government/collections/protected-food-name-scheme-uk-registered-products>>.

<sup>43</sup> <<https://www.theguardian.com/business/2017/feb/15/eu-fears-influx-of-british-champagne-once-brexit-ends-food-naming-rules>>.

<sup>44</sup> *Bollinger v Costa Brava Wine Co Ltd* [1960] RPC 16.

goods of the defendant.<sup>45</sup> The prospect of divergent levels of protection post-Brexit means that a negotiated arrangement as to what happens with currently protected GIs is necessary.

Indeed, any post-Brexit deal between the UK and the EU would very likely deal with the issue of currently protected PGIs and PDOs. For one thing, the United Kingdom is required to provide some form of protection owing to its membership at the World Trade Organization. The WTO's Agreement on Trade related Aspects of Intellectual Property Rights (TRIPS), which mandates minimum standards of IP protection, provides in its Article 22 that legal means to protect interested parties against misleading uses must be provided by WTO member states. Aside from this, any future deal with the European Union will necessarily involve protections of PGIs and PDOs. The EU places great importance on their protection within their trade negotiations as recently observed during discussions over the CETA treaty between the EU and Canada.<sup>46</sup>

## 2.4. COPYRIGHT

Unlike trade mark law, there is no overarching single regulatory system for EU copyright. Nonetheless, major elements of copyright law have been harmonised in the EU via national implementation of the following 10 EU Directives:

- Directive on the harmonisation of certain aspects of copyright and related rights in the information society ('InfoSoc Directive').<sup>47</sup>
- Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property ('Rental and Lending Directive').<sup>48</sup>
- Directive on the resale right for the benefit of the author of an original work of art ('Resale Right Directive').<sup>49</sup>
- Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ('Satellite and Cable Directive').<sup>50</sup>

<sup>45</sup> C WADLOW, *The Law of Passing-Off*, 5th edn, Sweet and Maxwell, London 2016, para 7-178.

<sup>46</sup> Comprehensive Economic and Trade Agreement (CETA), Chapter 20, Subsection C. See <<http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter>>.

<sup>47</sup> Directive 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] OJ L167/10.

<sup>48</sup> 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 L376/28.

<sup>49</sup> 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 L272/32.

<sup>50</sup> 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 L248/15.

- Directive on the legal protection of computer programs ('Software Directive').<sup>51</sup>
- Directive on the enforcement of intellectual property rights ('IPRED').<sup>52</sup>
- Directive on the legal protection of databases ('Database Directive').<sup>53</sup>
- Directive on the term of protection of copyright and certain related rights amending the previous 2006 Directive ('Term Directive').<sup>54</sup>
- Directive on certain permitted uses of orphan works ('Orphan Works Directive').<sup>55</sup>
- Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market ('CRM Directive').

There is insufficient space here to consider all of these legal areas. In the context of Brexit the EU-specific rights are of particular interest. One is the *sui generis* right for databases.<sup>56</sup> In a hard Brexit scenario, this EU right would no longer be binding in the UK. Post-Brexit, the UK could legislate on a national basis to establish a UK *sui generis* right; or alternatively, the courts may fall back on, or expand upon, the UK's traditional form of protection of databases as literary works under copyright.<sup>57</sup> Another example of an EU-specific right is the artist's resale right.<sup>58</sup> This right entitles authors of original works of art to a royalty each time one of their works is resold through an art market professional. This too would cease to be binding, post-Brexit, and the UK would need to legislate to bring in a UK equivalent right (if the UK Government wanted this form of protection to continue).

Yet another interesting point concerns the relevance of the case law of the CJEU.<sup>59</sup> This body of case law, post-Brexit, will in principle cease to be binding

<sup>51</sup> 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 L111/16.

<sup>52</sup> 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 L157/45, corrigendum [2004] OJ L195/16.

<sup>53</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20.

<sup>54</sup> 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 L372/12 (as amended by 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 L265/1).

<sup>55</sup> 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 L299/2.

<sup>56</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20.

<sup>57</sup> See eg *Blair v Alan S Tomkins & Anor* (1971) 21 QB 78 and *R Griggs Group Ltd v Evans* (2003) EWHC 291.

<sup>58</sup> Resale Right Directive, above n 49.

<sup>59</sup> See further the contribution by T HORSLEY (Ch 4) in this edited collection.

on the UK (unless there is a transitional or longer-term agreement between the UK and the EU that provides for the compulsory jurisdiction of the CJEU on copyright). Of particular significance is the EU originality threshold of ‘author’s own intellectual creation’ – as put forward by the CJEU in *Infopaq* as the standard for all copyright works.<sup>60</sup> Since that 2009 case, this test has displaced the traditional UK standard of ‘skill, labour and judgment’ (though the impact of this in practice has not been dramatic).<sup>61</sup> It is unknown at this stage whether the UK courts will revert to the old understanding of the originality test. Similarly, regarding the CJEU’s definition of parody for the purpose of exceptions and limitations, as expressed in the *Deckmyn* case, this will no longer be binding on the UK, post-Brexit.<sup>62</sup> The UK courts could therefore develop their own understanding of parody in the context of the fair dealing exception. However, the malleability of the common law means that the UK courts will be free to continue to apply the EU-derived tests of originality and parody, post-Brexit, even if they are no longer bound by CJEU rulings on copyright matters. Indeed, they may begin to develop these tests in ways that differ from the CJEU’s approach.

## 2.5. PATENTS

Historically, patent law has not been harmonised within the EU. The European Patent Convention (EPC) – agreed in 1973 – exists outside the Union and has a wider membership, including Turkey, Iceland and Switzerland as well as several other non-EU territories. Under the EPC, European patents (EPs) are filed, prosecuted and administered at the European Patent Office (EPO) in Munich.

Even though the primary governing law – the EPC – exists outside of the EU’s authority, the EU has, in fact, legislated in several areas relating to patents. The following pieces of EU legislation have a direct impact on patents:

- Directive 98/44/EC (biotechnological inventions);<sup>63</sup>
- Regulation 2100/94 (plant variety rights);<sup>64</sup>

<sup>60</sup> Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening*, ECLI:EU:C:2009:465.

<sup>61</sup> See discussion by Proudman J in *The Newspaper Licensing Agency Limited and others v Meltwater Holding BV and others* [2010] EWHC 3099 (Ch) and Arnold J in *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829 (Ch) at [319].

<sup>62</sup> Case C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, ECLI:EU:C:2014:2132.

<sup>63</sup> Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions [1998] OJ L213/13.

<sup>64</sup> Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights [1994] OJ L227. See also Council Regulation (EC) No. 873/2004 of 29 April 2004 amending Regulation (EC) No 2100/94 on Community plant variety rights [2004] OJ L162.

- Enforcement Directive 2004/48/EC;<sup>65</sup>
- Regulation 469/2009/EC (SPCs for medicinal products);<sup>66</sup>
- Directive 2001/82/EC (veterinary medicinal products);<sup>67</sup>
- Directive 2001/83/EC (medical products for human use);<sup>68</sup>
- Directive 2009/24/EC (computer programs);<sup>69</sup>
- Regulation 1257/2012 (UP Regulation).<sup>70</sup>

For present purposes, it is important to concentrate on two elements of the current system: (1) the jurisprudence of the CJEU in the above areas, most notably in the areas of biotechnology, supplementary protection certificates (SPCs) and enforcement; and (2) the Unified Patent Court and Unitary Patent – a new reformed patent enforcement system for participating EU Member States.

### 2.5.1. CJEU Jurisprudence on Patent-Related Matters

Given the limited nature of the above Regulations and Directives, the jurisprudence of the CJEU in patent matters is surprisingly wide-ranging. It is not the intention of this part of the chapter to give an authoritative overview of CJEU patent case law – instead, three important cases in three different areas of EU law are highlighted here to show the breadth of the CJEU's jurisdiction.

#### 2.5.1.1. The Biotechnology Directive (98/44/EC)

The Biotech Directive establishes the rules for the patenting of biotechnological inventions. It rules out patentability for inventions that involve 'uses of human embryos for industrial or commercial purposes'. However, the legislators did not give an answer to the politically loaded question – exactly what constitutes a 'human embryo'? Thus, in the *Brüstle* case the CJEU had to answer a series of questions on the meaning of human embryo in the context of patenting.<sup>71</sup>

<sup>65</sup> 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 L195.

<sup>66</sup> Regulation (EC) no 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products [2009] OJ L152.

<sup>67</sup> Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products [2001] OJ L118.

<sup>68</sup> Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L311.

<sup>69</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] O J L111.

<sup>70</sup> Council Regulation (EU) 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 L361.

<sup>71</sup> Case C-34/10, *Brüstle v Greenpeace*, ECLI:EU:C:2011:669.

The CJEU ruled in 2011 that Article 6(2)(c) of the Biotech Directive must be interpreted as meaning that:

‘The use of human embryos for scientific research purposes is not patentable. A ‘human embryo’ within the meaning of Union law is any human ovum after fertilisation or any human ovum not fertilised but which, through the effect of the technique used to obtain it, is capable of commencing the process of development of a human being.’

It is for the referring court to ascertain, in the light of scientific developments, whether a stem cell obtained from a human embryo at the blastocyst stage constitutes a ‘human embryo’ within the meaning of Article 6(2)(c) of the Biotech Directive.

#### 2.5.1.2. Regulation 469/2009/EC (SPCs for Medicinal Products)

This Regulation covers the granting of SPCs – effectively, extending the life of the patent – where there was a delay in granting the marketing authorisation for a patented medicine. In the case of *Arne Forsgren*,<sup>72</sup> the limits of SPC protection were examined by the CJEU. In the case, Protein D was present in a vaccine for paediatric use – Synflorix – where it was a carrier protein, conjugated by covalent bonds. However, the SPC application was for Protein D per se, not in the conjugated form found in Synflorix. The application for the SPC was therefore rejected by the Austrian national authority on the basis that Protein D is not present in Synflorix other than as a conjugate of other active ingredients as well as the fact that in Synflorix it is an excipient. The CJEU had to consider:

- (1) whether an SPC could be obtained in respect to a product per se in ‘separate’ form when the marketing authorisation was for a medicine in which the product is covalently bonded to other ingredients; and
- (2) whether the SPC could rely on a marketing authorisation which only described the product as a ‘carrier protein’ and did not provide any information about an independent therapeutic effect

The CJEU found in 2015 that the ‘covalent bonding’ issue should not prevent the granting of an SPC. On the issue of whether the marketing authorisation was adequate to support the grant of the SPC, the Court stated that for Protein D to be an ‘active ingredient’ as required by the Regulation it must produce ‘a pharmacological, immunological or metabolic action of its own which is covered by the therapeutic indications of the marketing authorisation’. It left that determination – whether to grant the SPC – to the referring court.

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<sup>72</sup> Case C 631/13, *Arne Forsgren v Österreichisches Patentamt*, ECLI:EU:C:2015:13.

### 2.5.1.3. The Enforcement Directive (2004/48/EC)

The Enforcement Directive governs the rules for enforcing intellectual property in the courts of the EU Member States. In the *OTK* case the operative question was as follows: does the Enforcement Directive prevent Member States from providing in their legislation the possibility to award punitive damages in IP cases?<sup>73</sup> The Polish Supreme Court sought guidance from the CJEU. The CJEU in 2017 ruled that the fact that Directive 2004/48 does not entail an obligation on the Member States to provide for ‘punitive’ damages cannot be interpreted as a prohibition on introducing such a measure.

### 2.5.2. *The Unified Patent Court (UPC)*

Although the grant of patents takes place at a centralised level – at the EPO – European patent litigation involving European patents (EPs) is actually undertaken on a largely national basis.<sup>74</sup> The reason is that EPs must be validated – and subsequently, litigated – within national jurisdictions.<sup>75</sup> National courts, therefore, have the ability to issue binding rulings concerning patent infringement within their national territories, and they also may consider questions of patent validity – although the EPO retains the final say on validity via its patent opposition service.<sup>76</sup> Nonetheless, it is not uncommon for national patent litigation to take place at the same time as parallel EPO opposition proceedings; and the lengthy backlog at the EPO means that national courts sometimes rule on questions of validity and infringement before the EPO Board of Appeals has reached a final decision regarding validity.<sup>77</sup> This has led in some cases to fragmentation of outcomes on validity and infringement across

<sup>73</sup> Case C-367/15, *OTK v SFP*, ECLI:EU:C:2017:36.

<sup>74</sup> Text of the European Patent Convention, of 5 October 1973, as revised by the Act revising Article 63 EPC of 17 December 1991, and the Act revising the EPC of 29 November 2000, available at <[http://documents.epo.org/projects/babylon/eponet.nsf/0/00E0CD7FD461C0D5C1257C060050C376/\\$File/EPC\\_15th\\_edition\\_2013.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/00E0CD7FD461C0D5C1257C060050C376/$File/EPC_15th_edition_2013.pdf)>. Also accessible at <<http://www.epo.org/law-practice/legal-texts/html/epc/2010/d/index.html>>.

<sup>75</sup> Even though at present a patentee can apply to the EPO for an EP with a single application in 1 of the 3 official EPO languages, once granted a patent must be filed and translated into the other 2 official EPO languages. See also The Agreement on the application of Article 65 of the Convention on the Grant of European Patents agreed on 17 October 2000 (see OJ EPO 549 (2001)) (hereafter known as the London Agreement) – available at <[http://documents.epo.org/projects/babylon/eponet.nsf/0/7FD20618D28E9FBFC125743900678657/\\$File/London\\_Agreement.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/7FD20618D28E9FBFC125743900678657/$File/London_Agreement.pdf)>.

<sup>76</sup> See generally EPO, *Patent Litigation in Europe – An overview of national law and practice in the EPC contracting states* (2013), <<https://www.epo.org/learning-events/materials/litigation.html>>.

<sup>77</sup> K CREMERS, M ERNICKE, D HARHOFF, C HELMERS, G LICHT, L MCDONAGH, I RUDYK, P SCHLISSLER, C SCHNEIDER and N VAN ZEEBROEK, ‘Patent Litigation in Europe’ (2013) *ZEW Discussion Paper* No 13–07, pp 1–3.



EU jurisdictions, something that impacts upon the single market and raises competition issues.<sup>78</sup>

To try to resolve these issues, on 19 February 2013 the UK and 24 other countries signed an intergovernmental agreement (the UPC Agreement) to create a Unified Patent Court (UPC), which will be a new specialist patents court common to participating states.<sup>79</sup> Overall, the package of measures is designed to establish and enforce unitary patent protection within the European Union,<sup>80</sup> with the ultimate ambition of unifying the European patent system as much as possible.<sup>81</sup>

In addition to the UPC Agreement, the new reform measures also include two EU Regulations which establish the European Patent with Unitary effect – also known as the Unitary Patent (UP) – and the associated translation arrangements.<sup>82</sup> The application and grant process for the UP will be the same as for the regular European patents (EPs); the option for unitary protection across participating EU Member States comes post-grant.<sup>83</sup> Importantly, the UPC will not only hear disputes regarding the validity and infringement of the new UPs but also existing and prospective EPs (subject to the transition period).<sup>84</sup>

<sup>78</sup> Ibid, pp 1–5.

<sup>79</sup> Agreement on a Unified Patent Court (The UPC Agreement) [2013] OJ C175/1, accessible at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:175:0001:0040:EN:PDF>>.

<sup>80</sup> J PILA, ‘The European Patent: An Old and Vexing Problem’ (2013) 62 *International & Comparative Law Quarterly* 917, 917–921. See also B VAN POTTESBERGHE, *Lost Property: The European Patent System and why it Doesn’t Work* (Bruegel Blueprint Series, 2009) available at <[http://bruegel.org/wp-content/uploads/imported/publications/patents\\_BP\\_050609.pdf](http://bruegel.org/wp-content/uploads/imported/publications/patents_BP_050609.pdf)>.

<sup>81</sup> 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 (UP Regulation), [2012] OJ L361/1 and Council Regulation (EU) 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 (Translation Regulation) [2012] OJ L361/89. For a further explanation of the changes, see the EPO website: <<http://www.epo.org/law-practice/unitary.html>>. See also R ROMANDINI and A KLICZNIK, ‘The Territoriality Principle and Transnational Use of Patented Inventions – the Wider Reach of a Unitary Patent and the Role of the CJEU’ (2013) 44 *International Review of Intellectual Property and Competition Law* 524–540; and M BRANDI-DOHRN, ‘Some Critical Observations on Competence and Procedure of the Unified Patent Court’ (2012) 43 *International Review of Intellectual Property and Competition Law* 372–389.

<sup>82</sup> 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 (UP Regulation), [2012] OJ L361/1 and Council Regulation (EU) 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 (Translation Regulation) [2012] OJ L361/89.

<sup>83</sup> R HILTY, ‘The Unitary Patent Package: Twelve Reasons for Concern’ (2012) 41 *CIPA Journal* 553–555.

<sup>84</sup> T COOK, ‘The Progress to Date on the Unitary European Patent and the Unified Patent Court for Europe’ (2013) 18 *Journal of Intellectual Property Rights* 584, 586.

### 2.5.3. *The Legal Sources of the Unified Patent Court and the UPC*

Legally, the existence of the Unitary Patent is enabled by a longstanding option under the EPC allowing the validation of patents on a supranational basis.<sup>85</sup> The EU Regulations were passed into law via the system of enhanced cooperation as reformed by the Lisbon Treaty.<sup>86</sup>

The EU Regulations are technically already in force.<sup>87</sup> However, they will apply only once the UPC Agreement is ratified by the requisite 3 + 10 countries, ie Germany, France and the UK plus 10 more signatory states. As of March 2017, this ratification has yet to take place. Until the Brexit referendum, the UK seemed to be well on the way to full ratification of the UPC. Indeed, for the past four years the UK Government has been making plans to host one of the new Court's central divisions in Aldgate, east London, where a building has already been leased in preparation for the new Court's establishment and mock trials have taken place.<sup>88</sup>

What is crucial in the Brexit context is that even though the UPC will have its own jurisdiction to rule with respect to most patent issues – like the infringement of patented drugs – it must defer to the CJEU in a small number of areas of EU law, arising under the areas considered earlier, such as biotechnology, enforcement or matters relating to Supplementary Protection Certificates. Under Article 21 of the UPC Agreement a referral can be made by the UPC to the CJEU in much the same way as an EU Member State national court would make such a referral.<sup>89</sup> In line with this, the CJEU in Opinion 1/09 held that only states that accept the supremacy of EU law and the jurisdiction of the CJEU may sign up.<sup>90</sup> Thus, the CJEU will undoubtedly have some judicial input within the UPC system, though every effort has seemingly been made by the planners to keep this role to a minimum with regard to substantive patent matters.<sup>91</sup> The experience of the

<sup>85</sup> Articles 2 and 142 EPC.

<sup>86</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, entered into force on 1 December 2009 [2007] OJ C306.

<sup>87</sup> Article 18(2) UP Regulation and Article 7(2) Translation Regulation.

<sup>88</sup> L MCDONAGH, *European Patent Litigation in the Shadow of the Unified Patent Court*, Edward Elgar, Cheltenham, 2016, pp 1–16. See also L MCDONAGH, 'Exploring Perspectives of the Unified Patent Court and the Unitary Patent within the Business and Legal Communities' *A Report Commissioned by the UK Intellectual Property Office* (July 2014), available at <<https://www.gov.uk/government/publications/exploring-perspectives-of-the-up-and-upc>>.

<sup>89</sup> See also Article 1(2) UPC Agreement and Article 267 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01.

<sup>90</sup> Opinion 1/09 [2011] OJ C211/28.

<sup>91</sup> R ROMANDINI and A KLICZNIK, 'The Territoriality Principle and Transnational Use of Patented Inventions – the Wider Reach of a Unitary Patent and the Role of the CJEU' (2013) 44 *International Review of Intellectual Property and Competition Law* 524, 524–529.

CJEU's expansive interventions in the areas of trade mark law and copyright law within the EU may have had an influence in this respect.<sup>92</sup>

It is here that UK Prime Minister Theresa May's recent speech on Brexit – she reiterated her vow that the UK would, post-Brexit, escape the jurisdiction of the Court of Justice of the European Union (CJEU) – becomes important. Furthermore, the same claim is made in the Government's Brexit White Paper.<sup>93</sup>

If the UK is indeed intent on a hard Brexit it is difficult to see how the UK could participate in the UPC, which requires accepting that the decisions of the Court of Justice – in patent law, at least – will be binding with respect to UPC decisions enforceable in the UK. Yet in November 2016, several months after the EU referendum result, the UK Government announced that the UK would ratify the UPC Agreement after all. Furthermore, in January 2017, a mere few days prior to May's speech, the new UK Minister for Intellectual Property, Jo Johnson, stated that the UK still intends to participate in the UPC, emphasising that the UPC is an international court rather than an EU one.<sup>94</sup> The UPC is now expected to be up and running by December 2017 or thereafter in 2018.

Though the decision to go for the twin strategy of a hard Brexit while maintaining UPC ratification at first appears to make little sense, on further contemplation there may actually be some method behind it. In its Brexit White Paper, the Government suggests that the creation of new dispute resolution panels or tribunals will be necessary to determine questions arising out of whatever agreement the UK and EU reach upon Brexit. The point made by Jo Johnson about the UPC being an international court, not an EU one, may not be mere rhetoric – it may indicate that the UK is willing to accept the jurisdiction of international courts or tribunals, like the UPC, to determine specific legal questions – for example, patent matters – that are common to the UK and its 'new partnership with the European Union' (as referred to in the Brexit White Paper).

In this respect, the UK Government may consider that although the UPC is bound by rulings of the CJEU on a number of EU-related patent matters – and UPC decisions on patent injunctions and revocations will be binding within the UK – this is a very different situation from that that currently exists under the sweeping jurisdiction of the CJEU, whose decisions can have the effect of immediately changing UK domestic law in a wide range of different areas.

<sup>92</sup> See J GRIFFITHS, 'Constitutionalising or Harmonising – the Court of Justice, the Right to Property and European Copyright Law' (2013) 38 *European Law Review* 65; and L MCDONAGH, 'From Brand Performance to Consumer Performativity: Assessing European Trade Mark Law after the Rise of Anthropological Marketing' (2015) 42 *Journal of Law and Society* 611–636.

<sup>93</sup> <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/588948/The\\_United\\_Kingdoms\\_exit\\_from\\_and\\_partnership\\_with\\_the\\_EU\\_Web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/588948/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf)>.

<sup>94</sup> <<https://www.twobirds.com/en/news/articles/2017/uk/uk-government-appoints-new-ip-minister>>.

If this is the UK Government's view, then UK UPC ratification makes a lot more sense. Indeed, the UK may even see the UPC as a model for the kind of specialist commercial court – maintaining a direct but limited link with the CJEU and the wider EU economy – that it would be willing to tolerate in its purported new 'partnership' with the EU. Of course, we do not know whether the EU would be willing to accept these kinds of bespoke arrangements, but the UK's own intentions may be becoming a bit clearer.

One final point: the fate of the UK's continued participation in the unitary patent scheme remains less certain. The UP, unlike the UPC, is created by an EU Regulation, and there is no way to consider it a purely 'international right' (although the existing EP granted by the EPO would fit this definition). Accepting the UP would require a more extensive assessment of EU law and as yet the UK Government has not given any clues as to its intentions. It remains possible that the UK – post-Brexit – will stay within the UPC but not the UP. A UK exit from the UP while UPC membership is maintained would mean that UP protection would not apply in the UK, but EPs valid in the UK could be litigated at the UPC.

## 2.6. THE INTERFACE OF INTELLECTUAL PROPERTY AND COMPETITION LAW

The ramifications of Brexit on IP law actually go beyond pure issues of intellectual property. The reason is that the interface between competition law and intellectual property is of practical importance with regards to the exercise and enforcement of IP rights (which by their nature are exclusive rights that can be used against competitors). EU law is of utmost relevance here since the EU has competence to legislate in the area of competition law, as deemed necessary for the functioning of the internal market pursuant to Article 3(1)(b) TFEU. In addition, the substantive provisions within the UK Competition Act 1998 are based on the competition law provisions within the TFEU.<sup>95</sup>

The two main provisions with regards to competition law, Articles 101 and 102 TFEU, have been applied to sanction certain anti-competitive behaviours of IP right holders. Article 101, for instance, prohibits restrictive agreements that could prevent, restrict or distort competition within the internal market. In order not to sanction beneficial agreements with regards to technology transfer, the EU Commission provides technology transfer block exemption regulations which specify which agreements would not fall foul of Article 101 TFEU.<sup>96</sup>

<sup>95</sup> M MIMLER, 'United Kingdom' in P CHROCZIEL, M LORENZ and W PRINZ ZU WALDECK UND PYRMONT (eds), *Intellectual Property and Competition Law*, Kluwer Law International, The Netherlands 2016, p 129.

<sup>96</sup> Article 2(1) Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements [2014] OJ L93/17.

Article 102 TFEU prohibits the abuse of a dominant position in the market. This can, for instance occur, where an undertaking that has a dominant position on the market refuses to license an IP right to a competitor.<sup>97</sup>

Brexit would mean that the links to the EU *acquis* would be severed subject to any transitional arrangements. Therefore, the impact of Brexit on this utterly ‘European’ field of law and its impact on the interface of intellectual property and competition law in the UK remains to be seen. A key question that arises with regards to IP practice is the future of so-called Euro-Defences. Such defences could be applied by a defendant in an IP infringement case arguing that a positive finding of infringement could be a violation of the principles enshrined within Article 101 or 102 TFEU.<sup>98</sup> Such defences are often brought forward in cases surrounding standard essential patents (patents essential to a technological standard).<sup>99</sup> Brexit would undermine the rationale of such defences as stemming from the TFEU. Owing to the similarity of the Chapter I and II prohibitions within the Competition Act 1998<sup>100</sup> with Articles 101 and 102 TFEU a similar application in future could be applied. Therefore, it can be expected that UK competition law practice would closely follow developments within EU practice.

## 2.7. EXHAUSTION

Finally, Brexit would place the doctrine of exhaustion under new scrutiny. As mentioned, IP rights have the potential to impede freedom movement of goods under Article 34 TFEU. In order to prevent IP rights from impairing this fundamental principle, it was held that once a product has been placed on the market with the IP right holder’s consent, he or she is prevented from restricting any further circulation, ie the rights are exhausted.<sup>101</sup> Importantly, this principle also applies to all states within the EEA pursuant to Protocol 28 of the EEA Agreement. Therefore, the current framework presents itself as a system of regional exhaustion where IP rights are no longer enforceable once they have been put onto the market in the EEA by the right holder, subject to certain exceptions.

This current system has been criticised since it prevents EU Member States from applying a different system of exhaustion.<sup>102</sup> Soft Brexit, hence

<sup>97</sup> Joined Cases C-241/91P and C-242/91P, *Radio Telefis Eireann v Commission (Magill)*, ECLI:EU:C:1995:98.

<sup>98</sup> MIMLER, above n 95, 129.

<sup>99</sup> eg *IPCom v Nokia* [2012] EWHC 1446 (Ch).

<sup>100</sup> Competition Act 1998, sections 2–16 and sections 18–24.

<sup>101</sup> Case 16-74, *Centrafarm BV et Adriaan de Peijper v Winthrop BV*, ECLI:EU:C:1974:115.

<sup>102</sup> With regards to trade marks: Case C-355/96, *Silhouette International Schmied GmbH & Co KG v Hartlauer Handelsgesellschaft mbH*, ECLI:EU:C:1998:374.

EEA membership, would not alter the application of the current EU doctrine of exhaustion in the UK. In the case of a hard Brexit, however, the UK could prevent the importation of goods that were put onto the market within the EEA; alternatively, the UK could apply principles of international exhaustion, which would permit the importation of goods that have been placed onto the market anywhere in the world. The specific framework, however, will depend on the outcome of the Brexit negotiations.

### 3. CONCLUSION

There are myriad challenges in untangling the UK from EU intellectual property law. The most pressing concern for UK IP holders will be the loss of the EU Intellectual Property Office at Alicante, which registers EU trade marks and registered designs. To ensure continuity in the protection of trade marks and designs, a new regime to convert existing EU rights into UK rights will likely be required, which could stretch the resources of the UK Intellectual Property Office. For the other major rights – copyright and patents – the crucial issues are only of slightly less consequence. Copyright lawyers will be watching in earnest to see if the UK legislates to mirror EU-rights such as the artist’s resale right and the *sui generis* database right, and will be keenly observing how UK judges interpret EU-derived tests for concepts such as originality and parody in a post-Brexit environment. In the patent context, all eyes are on the Unified Patent Court and the Unitary Patent, as the UK intends, as of March 2017, to continue to play a major part in Europe’s new reformed patent litigation system. Yet, even if the UK is willing, it cannot be taken for granted that the EU will allow the UK, soon to be a non-Member State, to participate in a system specifically tailored with the EU single market in mind. There is no doubt that Brexit will be a headache for IP owners and legislators, but it also promises to be a fascinating process.