



IP in a World of Change: Europe and Brexit;
United States and its exit from the TPP:
Where does IP Protection come in?

Europe and Brexit - Exhaustion and litigation issues

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22 August 2017

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EU and UK laws will part ways

- EU law will cease to apply in the UK
- All binding EU law at the moment of Brexit will be converted by the Great Repeal Act into domestic, UK Supreme Court level law
- No more references to the Court of Justice of the EU from the UK
- UK and EU law will develop separately from then on
- The UK will no longer be a “member state” for the purposes of the EU Treaties. This has a significant effect

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Why does Brexit matter to IP?

- A significant part of current UK legislation and case law is European law – mostly trade marks and designs, some copyright, but also fundamental jurisdictional rules
- A very large share of European IP litigation currently takes place in the UK, especially in life sciences and complex, commercially significant cases
- Pulling all this apart will mean big changes and laws will need to be reformed, changed and revised for years to come. There will be uncertainty for right holders and opportunities for many

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Three themes

- The UPC – a European project
- Exhaustion of rights
- Parallel litigation

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Theme 1 - The UPC

- A project for a unified patent system for Europe, developed over many decades
- Designed to complement and then replace the current system, which involves unified prosecution but separate, parallel litigation in many jurisdictions
- Political momentum was built by June 2016. Was ready to go ahead
- But now uncertainty due to Brexit and a constitutional challenge in Germany
- Continuance of London part of central division in doubt

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The UPC: Possible decision-makers



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The German constitutional challenge (as at 17 August 2017)

“In terms of substance, plaintiff is essentially asserting a breach of the limits to surrendering sovereignty that are derived from the right to democracy (Art. 38 (1), clause 1, Basic Law). Primarily the following violations are asserted:

- breach of the requirement for a qualified majority arising from Art. 23 (1), sentence 3, in conjunction with Art. 79 (2) Basic Law;*
- democratic deficits and deficits in rule of law with regard to the regulatory powers of the organs of the UPC;*
- the judges of the UPC are not independent nor do they have democratic legitimacy*
- breach of the principle of openness towards European law owing to alleged irreconcilability of the UPC with Union law.*

The proceedings are pending; a specific date for the decision is presently not foreseeable.”

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The UPC: Pros

- Can provide an EU-wide injunction. In a patent case today, cases are typically fought in fewer than 50% of EU states, leaving 50%+ of member states not covered by an injunction to prevent continued infringement
- In principle, represents a more logical way to organise patent litigation
- Unified procedure stops jurisdictions making their Court procedures ever more attractive to plaintiffs at the expense of defendants
- **Promised** to be less expensive than the current system

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The UPC: Cons

- EU-wide injunctions enforced nationally
- Does not use the very successful and robust prior models of jurisdictional competence, and instead a completely new model has been developed involving a “central” division divided into three decentralised central divisions and a number of local and regional divisions. Predictions of forum shopping are unsurprising
- Complex systems of enforcement, bifurcation and non-bifurcation, aims to merge common law and civil law systems and the role of oral evidence is especially unclear. Allows court procedures to be made more competitive.
- **Predicted** to be more expensive than the current system

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The UPC: Pros

- EU-wide injunction available
- In principle, represents a more logical way to organise patent litigation
- Stops jurisdictions competing
- **Promised** to be less expensive

The UPC: Cons

- EU wide injunction has to be enforced nationally
- Completely new, complex system
- Allows jurisdictions more ways to compete.
- **Predicted** to be more expensive

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Theme 2 - Exhaustion

- EU case law (*Centrafarm*): When a product is placed on the market in an EU member state, with the consent of the patentee, patents in EU member states are exhausted
- Because the UK will no longer be an EU member state, placing a product on the UK market should no longer exhaust patents in EU (there is no proposal to change EU law in response to Brexit)
- But placing a product on the market in an EU member state may exhaust the relevant UK patent under UK domestic case law (*Betts v Wilmot*)
- Lower priced products may flow from the EU into the UK

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Theme 3 – Parallel litigation

- Currently EU law regulates which court has jurisdiction, and in particular prohibits anti-suit injunctions within the EU
- In the future, will:
 - UK courts pick up where they left off in the 1990s with anti-suit injunctions?
 - UK courts determine the validity of foreign patents including EU patents?
 - EU courts seek to determine infringement of an EP(UK)? See *GAT v Luk* for an effort that ran into EU law

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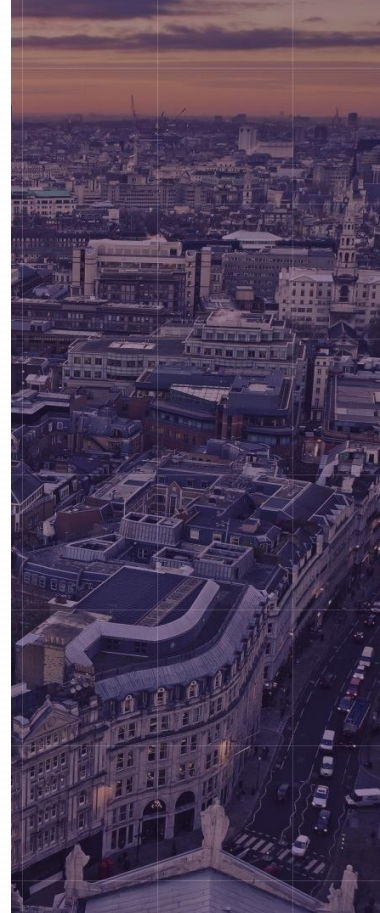
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Thank you

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